APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 75 and 76

September Term, 1966

(Argued November 28, 1966

Decided January 30, 1967)

Docket Nos. 30445 and 30446

JOSEPH CARROLL, CHARLES PETERSON and CHARLES TURECAMO, as Treasurer, Orchestra Leaders of Greater New York,

Plaintiffs-Appellants

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, HERMAN D. KENIN, as President of said Federation, STANLEY BALLARD, as Secretary of said Federation, and GEORGE V. CLANCY, as Treasurer of said Federation, ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, and AL MANUTI, as President of Local 802, MAX L. ARONS, as Secretary of Local 802 and HI JAFFE, as Treasurer of Local 802,

Defendants-Appellees

Before FRIENDLY, SMITH and ANDERSON, Circuit Judges.

Appeal from a judgment dismissing the two complaints in a consolidated class action, charging the defendants with violations of the anti-trust laws, in the United States District Court for the Southern District of New York, Richard H. Levet, J. Affirmed except as to determination of issue of price-fixing on which the judgment is reversed and remanded.

Godfrey P. Schmidt, Esq., New York City
New York, for Plaintiffs-Appellants

Emanuel Dannett, Esq., New York City, New York (McGoldrick, Dannett, Horowitz & Golub, Attorneys for Appellees American Federation of Musicians of the United States and Canada, Herman D. Kenin, Stanley Ballard and George V. Clancy; Ashe & Rifkin, Attorneys for Appellees Associated Musicians of Greater New York, Local 802, Al Manuti, Max Arons and Hy Jaffe; Henry Kaiser, Esq., Jerome H. Adler, Esq., David I. Ashe, Esq., George Kaufmann, Esq., and Eugene Mittelman, Esq., on the brief) for Defendants-Appellees

ANDERSON, Circuit Judge:

Plaintiffs-appellants are orchestra leaders, who in a series of suits over the past several years, have challenged the legality of numerous activities and regulations of the appellees.[1] The present actions instituted by appellants, Peterson and Carroll, in which Ben Cutler and Marty Levitt were allowed to intervene, as claimed class actions on behalf of themselves and as representatives of other orchestra leaders, charged the American Federation of Musicians and its New York affiliate, Associated Musicians of Greater New York, Local 802, with nine separate violations of the anti-

[1] Carroll v. Associated Musicians, 206 F. Supp. 462 (S.D.N.Y. 1962) affirmed, 316 F.2d 574 (2 Cir. 1963); Cutler v. American Federation of Musicians, 211 F. Supp. 433 (S.D.N.Y. 1962), 316 F.2d 546 (2 Cir.), cert. denied 375 U.S. 941 (1963). By stipulation, the testimony in those actions is made a part of the record in this action.

Appellants' motions for preliminary injunctions were passed upon on appeal by this court in Carroll v. Associated Musicians, 284 F.2d 91 (2 Cir. 1960), affirming 183 F. Supp. 636 (S.D.N.Y. 1960); Carroll v. American Federation of Musicians, 295 F.2d 484 (2 Cir. 1961); and Carroll v. American Federation of Musicians, 310 F.2d 325 (2 Cir. 1962).

trust laws, none of which is protected by either the Clayton Act[2] or the Norris-LaGuardia Act.[3]

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[2] Section 6 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 17 (1959) provides:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purpose of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

Section 20, of the Clayton Act, 38 Stat. 738 (1914), 29 U.S.C. § 52 (1959) provides:

> "No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which there is no adequate remedy at law . . . And no such restraining order or injunction shall prohibit any person or persons [from striking, assembling, organizing, etc.] . . ."

[3] Section 4 of the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 104 (1959), provides:

> "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons . . . from doing, whether singly or in concert, any of the following acts:
> [striking, joining a labor union, giving strike benefits, lawfully aiding in a labor dispute, publicizing a dispute, assembling, etc.]"
> "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." Norris-LaGuardia Act § 13, 47 Stat. 73 (1932), 29 U.S.C. § 113(c) (1959).

The first complaint was filed in July 1960 and the other, brought to include a challenge to an increase in the musicians' wage scale adopted after the July suit was started, was filed in December, 1960. Both actions sought preliminary and permanent injunctive relief, as well as treble damages for alleged injuries. The district court, sitting without a jury, after a trial of five weeks, dismissed the complaints and entered judgment for the defendants. *Carroll v. American Federation of Musicians,* 241 F. Supp. 865 (S.D.N.Y. 1965). The appeal to this court presents the question of whether various practices of the unions violate the Sherman Act.[4]

The American Federation of Musicians, an affiliate of the AFL-CIO, consists of 683 local unions and has a membership of more than 260,000. Almost all of the musicians in the United States, referred to in the trade as sidemen, and most of the orchestra leaders and sub-leaders, who act as substitute orchestra leaders, are members of the Federation or its locals. Local 802, with 30,000 members, has virtual control of labor in the music industry in the New York area. The appellants were members of Local 802 when this action was brought, but Carroll and Peterson have been expelled from membership since that date.

Essential to an understanding of the issues presented is a definition of terms and a description of the practices which distinguish the industry.

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[4] 26 Stat. 209 et sec. (1890), 15 U.S.C. §§ 1 and 2 (1959):
Section 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

Section 2:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."

Musical engagements are generally classified as either "steady", those lasting for longer than one week, or "single", usually one day of one performance affairs but including all engagements lasting less than one week. The much sought after steady engagements are rare in comparison with the number of single engagements.

The predominant form of single engagement is the "club date", such as weddings, parties and dances, which provides employment for the largest number of musicians. Single engagements also include the "non-club date" field, consisting of television appearances or recording engagements, etc. The distinction between the kinds of single engagements is vital; the non-club date engagements are ordinarily governed by collective bargaining agreements concluded by the union and the "purchaser" of music. The same is usually true of the steady engagement field. Local 802 has collective bargaining agreements with the major users or "purchasers" of live music within its area such as recording companies, hotels, television and film producers, opera companies and theatres. These agreements treat the "purchaser" as the employer and the orchestra leader as its employee, little different from a sideman. Indeed, in this field such a characterization would ordinarily be justified, because in the recording industry, for example, in which all engagements are governed by such collective bargaining agreements, a regular employee of the recording company exercises general supervision over the orchestras hired. He selects the orchestra leader, who does the conducting and some arranging, hires the sidemen and determines their number, their instruments and the compositions to be played and exercises general control over the orchestra's performance. The recording company pays each musician, as well as the orchestra leader, individually and is responsible for the withholding of social security, federal and state taxes, as well as all bookkeeping. The practices are similar in most engagements covered by the union's collective bargaining agreements.

The club date field is entirely different in that it is not governed by collective bargaining agreements. Rather, the orchestra leader secures the engagement, either by himself or through booking agents, and negotiates directly with the music purchaser, usually for a flat price, and the responsibility for collecting the fee, paying the sidemen, withholding taxes and keeping records is his. His remuneration is the difference between his costs, primarily the wages of sidemen, and the amount received from the music purchaser. The district court assumed, without explicitly finding, that orchestra leaders are employers or independent contractors when operating in this field. In light of the fact that an orchestra leader working a club date is no different from any other independent contractor, who employs his own laborers, we conclude, as we have in other contexts in this litigation, see, *e.g.*, *Cutler v. American Federation of Musicians,* 316 F.2d 546, 549 (2 Cir. 1963), affirming 211 F. Supp. 433, 445 (S.D.N.Y. 1962); *Carroll v. American Federation of Musicians,* 295 F.2d 484, 486 (2 Cir. 1961); *Carroll v. Associated Musicians,* 284 F.2d 91 (2 Cir. 1960), affirming 183 F. Supp. 636 (S.D.N.Y. 1960), that orchestra leaders are employers in the club date field.

It should not be inferred, however, that orchestra leaders are a homogeneous class. Some of them act only as orchestra leaders, a few of whom employ more than one orchestra at a time. When the leader is not with his orchestra, he employs a sub-leader as his substitute. Others work only part-time in this capacity, accepting whatever engagements they can find, and work as sidemen or sub-leaders the rest of the time. Still others work as orchestra leaders part-time and are regularly employed outside of the music industry. While the majority of leaders' engagements are in the club date field, they also seek engagements outside of it, either in the single or steady date field. Obviously there is a great deal of fluidity in the industry. Very few orchestra leaders employ their own orchestras full-time. The normal practice is for an orchestra leader first to secure an engagement, deter-

mine how many sidemen will be needed, and then employ them through the union hiring hall.

Most engagements are secured through booking agents, who since 1936 have been regulated by the Federation and its local unions, because during the depression booking agents took advantage of the job shortages in the music industry by charging exorbitant commissions. Under present union by-laws, union members are forbidden to accept engagements from booking agents not licensed by the union. The licensing agreements limit the commissions of booking agents to 10% for steady engagements and 15% for single engagements; and the agents must agree not to book non-union orchestras or musicians or to book orchestras for engagements at less than the union scale. In the past, engagements were also secured through the owners of catering halls and their employees, for which the caterer received a commission. Present union by-laws forbid this practice.

The Federation exercises rigid and monolithic control over much of the music industry, and this is especially true of Local 802 in the New York area. Within the jurisdiction of the Local, the closed shop is enforced by numerous by-laws, and pressure is placed upon orchestra leaders in various ways to induce them to become union members. For example, union members are not permitted to work in an orchestra in which a non-member leader either conducts or plays or which bears the name of a non-member.[5] A non-union orchestra leader may thus operate only if he hires sub-leaders to conduct. This is the situation of both Carroll and Peterson since their expulsion from the union. There are further restrictions which prevent union members from playing for proscribed or "unfair" persons, for instance an orchestra leader who has employed non-union musicians.

Having achieved a virtual closed shop, Local 802 regulates the club date field in great detail. Under its by-laws, member orchestra leaders are required to follow the "Price

[5] Article IV, § 1(h) of the Local 802's by-laws.

List Booklet", which is actually a codification of the standing resolutions of Local 802's Executive Board, and it governs all musical engagements not subject to any of the local's outstanding collective bargaining agreements. The booklet characterizes orchestra leaders as employees—"personnel managers"—and refers to the purchaser of music as the employer. It contains resolutions which establish the minimum number of sidemen required and the wage scales for the sidemen and sub-leaders in all engagements covered by it, providing with considerable specificity for variations according to the number of performances, the nature and length of the engagement, the establishment where it is played, and similar details.

The price list also sets a minimum for all covered engagements under the title "Regulations for Establishing Leaders' Fees in Single Engagements." These regulations, in fact, establish price floors because the orchestra leader is required to charge the music purchaser not less than the total of his "leader's fees", the sidemen's wages and other fees.[6] The leader's fee is a specific percentage above the union wage scale, graduated according to the number of musicians performing. Price floors are set for both single and steady engagements.

As indicated above, the price list is established unilaterally by Local 802. Under its by-laws the Executive Board is authorized to adopt resolutions establishing wages and prices, except where a meeting of the general membership votes on such price list resolutions. Once promulgated, the members must comply with such resolutions. There is no collective bargaining with orchestra leaders concerning the wage scales, price restrictions or other regulations established in the price list. Nor is there any collective bargaining with purchasers of music except, as discussed

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[6] The other required charges include an 8% addition, equivalent to social security costs, minimum charges for the carting of instruments and mileage fees for travel to the engagement and the standard 10% surcharge for traveling engagements.

earlier, in the case of large scale users of music who have standing agreements with Local 802 or with the Federation. Thus, in the club date field, which comprises most of the single engagements, and in many of the steady engagements, terms and conditions of employment, including wages, and minimum prices for orchestral engagements are determined by unilateral action of the union.

Enforcement of the regulations promulgated by the Executive Board is achieved by requiring orchestra leaders to report to Local 802 and by insistence upon the use of the Federation's "Form B" contract. This contract form, characterizing orchestra leaders as employees, was adopted by the Federation in 1941, and is the only engagement contract which a member is permitted to sign. The by-laws also provide that such contracts must be submitted for approval to the local union before the performance. Local 802, however, has relaxed these rules for single engagements by accepting an assurance either by telephone, by letter or by a report in person that the agreement with the purchaser complies with all union regulations and provides for payment of the sidemen according to the union wage scale. It insists, in addition, that all engagements as orchestra leaders first be approved by the Executive Board. In order further to assure compliance with the Price List, Local 802 employs "business representatives" who attend engagements to make certain that all regulations are being obeyed.

In order to protect the job market for local musicians against the encroachments of musicians and orchestra leaders who do not normally operate in the area, the Federation has instituted additional regulations for traveling engagements, which are those played by orchestras and members outside of the jurisdicition of their respective local unions. Formerly such engagements were sought to be curtailed by a 10% traveling surcharge which orchestra leaders were required to pay to the Federation.

After this court held that the tax violated §302 of the Taft-Hartley Act, *Cutler v. American Federation of Musi-*

cians, 316 F.2d 546 (2 Cir.) cert. denied 375 U.S. 941 (1963), the Federation adopted a price differential plan. The new by-laws require a traveling orchestra to charge, for steady engagements, 10% more than the minimum fee for a local orchestra and, for single engagements, 10% more than the minimum price of either its home local or of the local in whose territory it is playing, whichever is greater. Orchestra leaders performing steady traveling engagements are barred from accepting any single engagements anywhere until after the steady engagement has been completed; and at the termination of the initial engagement, they are also barred from accepting a succeeding steady engagement in the invaded territory.

In addition to inhibiting traveling orchestras, the Federation also discourages the travel of its members by various restrictions on the importing of musicians by a local orchestra leader. Although musicians are privileged as a matter of right to transfer their membership from one local to another, provided that they do not compete for jobs in the new area for three months after their transfer, the emphasis of the Federation's regulations is strongly placed upon maintaining a protected job market for the members of each local and thereby assuring the strength of the Federation's local unions.

The appellants, who claim to be representative of a class of orchestra leaders, contend that the foregoing practices and regulations of the Federation and of Local 802 violate the Sherman Act in the following respects:

(a) they fix the minimum prices which may be charged for orchestral engagements;

(b) they require that orchestral engagements be played by the minimum number of sidemen which the union establishes;

(c) they impose territorial restrictions on the operations of orchestra leaders and sidemen;

(d) they establish a monopoly in the music industry;

(e) they require all employers to use, for orchestral engagements, a written form of contract provided by the union;

(f) they refuse to bargain with orchestra leader-employers about the terms and conditions of employment;

(g) they coerce orchestra leaders into becoming members of the union;

(h) they regulate the activities of booking agents with whom the orchestra leaders must deal; and

(i) they deny orchestra leaders the opportunity to accept engagements from caterers.

A threshold question is whether appellants do in fact represent a class under Rule 23(a), Fed. R. Civ. P., as well as themselves as individuals. Their claim is that they adequately represent the interests of the class of persons within the jurisdiction of Local 802 who devote all or almost all of their time to being orchestra leaders and, as such, operate primarily in the club date field. The district judge ruled that the action could not be maintained as a true class action under Rule 23(a)(1)[1], and we are in accord with the decision on that issue.

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[1] Rule 23(a), Fed. R. Civ. P. in pertinent part provides:

"If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

* * * * *

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

In a true class action, all of the members of the class, including those absent, are bound by the judgment. See *Supreme Tribe of Ben Hur v. Cauble,* 255 U.S. 356 (1921); *Dickinson v. Burnham,* 197 F.2d 973 (2 Cir.), cert. denied 344 U.S. 875 (1952); *Giordano v. Radio Corporation of America,* 183 F.2d 558 (3 Cir. 1950). Therefore the interests of the affected persons must be carefully scrutinized to assure due process of law for the absent members. See *Hansberry v. Lee,* 311 U.S. 32 (1940). Since all members of the class are to be bound by the judgment, diverse and potentially conflicting interests within the class are incompatable with the maintenance of a true class action.

A spurious class action under Rule 23(a)(3), however, does not bindingly adjudicate the rights of members of the class who do not come before the court. *Nagler v. Admiral Corp.,* 248 F.2d 319, 327 (2 Cir. 1957); *Dickinson v. Burnham, supra* at 979; *California Apparel Creaters v. Wieder,* 162 F.2d 893, 896-897 (2 Cir.), cert. denied, 332 U.S. 816 (1947); *York v. Guaranty Trust Co.,* 143 F.2d 503, 529 (2 Cir. 1944), reversed on other grounds, 326 U.S. 99 (1945).

Although Rule 23(a) requires that the parties suing on behalf of the class insure the adequate representation of all members of the class without distinguishing between true and spurious class actions, the res judicata distinction between the two is vital. A much stricter standard for determining the adequacy of representation should obtain where there are non-intervenors who would be bound by the judgment. See *Oppenheimer v. F. J. Young & Co.,* 144 F.2d 387, 390 (2 Cir. 1944); Cf. *York v. Guaranty Trust Co., supra* at 528, n. 52 ("As the suit comes within Rule 23(a)(3), so that a judgment will not be res judicata as to . . . [non-intervenors], there is no necessity for a searching inquiry concerning the adequacy of her representation of others in the class.")

It is apparent that the present case does not qualify as a true class action under Rule 23(a)(1). It was brought by

orchestra leaders as a direct challenge to the unions' control in the music industry, but there is evidence that many orchestra leaders are willing members of the union and subscribe to its policies; and there was no evidence offered by the appellants that such a group did not exist. Indeed, the unions' price-fixing programs would assure those who are less successful and well-known of earning at least the union fee when they work instead of the lower sum they might get under free competition. The desire to protect their interests gives them the same motivation that generates most horizontal price-fixing arrangements. Similar economic benefits to orchestra leaders are inherent in other of the union's regulations, for example, the restrictions on traveling engagements. Thus appellants' representation cannot be said fairly to insure that the interests of these absent orchestra leaders will be protected. *Hansberry v. Lee, supra.* Cf. *Giordano v. Radio Corporation of America, supra* at 560. Consequently the judgment in this action can bind only the named defendants and the four individual plaintiffs before the court.

We are in agreement with the district court's conclusion that the question of whether the representation of appellants is adequate to support a spurious class action should not be answered at this time. Such an action is actually no more than a permissive joinder device. *York v. Guaranty Trust Co., supra; California Apparel Creators v. Wieder, supra; Nagler v. Admiral Corp., supra.* "It stands as an invitation to others affected to join in the battle and an admonition to the court to proceed with proper circumspection in creating a precedent which may actually affect non-parties, even if not legally *res judicata* as to them. Beyond this, as we in common with other courts have pointed out, it cannot make the case of the claimed representatives stronger, or give them rights they would not have of their own strength, or affect legally the rights or obligations of those who do not intervene." (Footnote omitted). *All-American Airways*

v. Elderd, 209 F.2d 247, 248 (2 Cir. 1954). 3 Moore, Federal Practice ¶23.10 (1) and (3). At the present time, nobody is attempting to intervene; until somebody does, it is not necessary to decide that issue.

Application of the Sherman Act to the activities of labor unions involves a balancing of conflicting Congressional policies. Many of the devices which labor unions are permitted to use to further the interests of workers are similar to those forbidden to businessmen by the anti-trust laws. It is, of course, settled that "labor unions are to some extent and in some circumstances subject to the [Sherman] Act . . ." *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 489 (1940). The history of the use of the anti-trust laws against labor unions and the resulting legislation passed by Congress make it clear that the Sherman Act's area of application in labor cases is now restricted to certain narrowly defined practices; the Norris-LaGuardia Act takes all "labor disputes", as therein defined, outside of the reach of the Sherman Act.[8]

Appellants contend that this case comes within the rule of *Allen Bradley Co. v. Local 3,* 325 U.S. 797 (1945), which creates an exception to the immunity afforded the unions for those cases in which a labor union combines with businessmen to achieve a commercial restraint. See also *United States v. Employing Plasterers' Association,* 347 U.S. 186 (1954); *United Brotherhood of Carpenters and Joiners v. United States,* 330 U.S. 395 (1947); *United States v. Hutcheson,* 312 U.S. 219 (1941) (dictum). Cf. *Hunt v. Crumboch,* 325 U.S. 821 (1945), decided the same day as *Allen Bradley Co.* (holding a union exempt because there was no conspiracy with a business group); *Cedar Crest Hats, Inc. v. United Hatters Union,* 362 F.2d 322 (5 Cir. 1966); *Green-*

[8] Although the statute is cast in terms of the federal courts' jurisdiction to grant injunctive relief, it also applies to criminal prosecutions under the anti-trust laws, United States v. Hutcheson, 312 U.S. 219, 234-235 (1941), and cases at law.

stein v. National Skirt and Sportswear Association, Inc., 178 F. Supp. 681 (S.D.N.Y. 1959), appeal dismissed 274 F.2d 430 (2 Cir. 1960). Under the appellants' view of this case, there is a conspiracy by the unions with "non-labor" groups to engage in practices which are unlawful, because they are in restraint of trade. But the facts do not support such a conclusion.

Allen Bradley Co. was a case involving a conspiracy between businessmen and a labor union to prevent goods produced outside of the New York area from being sold within that area. The purpose of this compact was to create a local business monopoly. For a union's activity to fall outside of the protection of the definition of a "labor dispute" in §13 of the Norris-LaGuardia Act (see footnote 3, supra), it must be shown that there was a conspiracy with a "non-labor group". That principle was reaffirmed by the opinion of the Court in *United Mine Workers v. Pennington,* 381 U.S. 657 (1965). Three members of the Court in a separate concurring opinion concluded that the trier could infer such a conspiracy from the fact of an industry-wide collective bargaining agreement which tended to achieve an unlawful restraint. See the concurring opinion 381 U.S. at 673. In *Pennington,* the claim was that the United Mine Workers had "entered into a conspiracy with the large [coal mine] operators to impose the agreed-upon wage and royalty scales upon the smaller, nonunion operators, regardless of their ability to pay and regardless of whether or not the union represented the employees of these companies, all for the purpose of eliminating them from the industry, limiting production and pre-empting the market for the large, unionized operators." 381 U.S. at 664. It was for that reason that the union's wage agreement was not exempted from the anti-trust laws.

In the present case there is no evidence of a conspiracy between Local 802, or the Federation, and orchestra leaders to eliminate competitors, fix prices or achieve any other

commercial restraint, nor was such a finding made by the district judge. Rather, the record establishes that all restraints were instituted unilaterally by the unions and acquiesced in by the orchestra leaders. Nor does the fact that the unions reached agreements with non-labor groups—booking agents, recording companies and others—place this case within the exception.

Nevertheless, there is a narrower ground upon which the legality of the unions' activities must be tested. If the unions coerced orchestra leaders with regard to a matter which is not a "term or condition of employment", they would not be exempt from the provisions of the Sherman Act, because the Norris-LaGuardia Act affords immunity from the impact of the anti-trust laws only for "labor disputes"; it does not provide a blanket exemption.

This rule is readily apparent from the Supreme Court's disposition of *Local Union No. 189 v. Jewel Tea Co.*, 381 U.S. 676 (1965), decided the same day as *Pennington*. In that case, the Meatcutters' and Butchers' Union sought to prevent any store in the Chicago area from selling meat except during the hours of 9:00 A.M. to 6:00 P.M. All members of a bargaining association of stores acceded to the union's demand except Jewel Tea Co., which held out. The union called a strike against it which thereby forced Jewel Tea to acquiesce. On Jewel Tea's suit to void this condition in its contract with the union, the district court held that there was no evidence of a conspiracy between the union and the retailers' association to impose the restricted marketing hours on the company. The case thus came to the Supreme Court "stripped of any claim of a union-employer conspiracy against Jewel." 381 U.S. at 688. Mr. Justice White, announcing the decision of the Court, said that the marketing hours restriction would not have been immune if it had not been a mandatory subject of collective bargaining, which the Court held that it was. In a concurring opinion, Mr. Justice Goldberg, writing for himself and two

other members of the Court, was in essential agreement with this position, but took issue with what he thought was Mr. Justice White's "narrow, confining view of what labor unions have a legitimate interest in preserving and thus bargaining about." 381 U.S. at 727. He conceded, however, that the "direct and overriding interest of unions in such subjects as wages, hours and other working conditions, which Congress has recognized in making them subjects of mandatory bargaining, is clearly lacking where the subject of the agreement is price-fixing and market allocation." 381 U.S. at 732-733.

These statements are applicable as well to the present case. Here, of course, since the unions do not bargain with orchestra leaders or with music purchasers in the club date field, the unions' protective provisions do not, as in *Jewel Tea,* appear in agreements with employers. They are, instead, unilaterally adopted by the unions and complied with by the orchestra leaders because of the threats of retaliation present in the unions' by-laws. The policy considerations are, however, the same.

"[E]xemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws." *Local Union No. 189 v. Jewel Tea Co., supra,* at 689 (White, J.). Thus, in the absence of an illegal conspiracy, mandatory subjects of collective bargaining carry with them an exemption; the national labor policy demands that the parties be permitted freely to reach agreement on terms and conditions directly affecting the working man. See *Local 24 v. Oliver,* 358 U.S. 283 (1959). Cf. *United States v. American Federation of Musicians,* 47 F. Supp. 304 (N.D. Ill. 1942) aff'd per curiam 318 U.S. 741 (1943); *United States v. Carrozzo,* 37 F. Supp. 191 (N.D. Ill. 1941), aff'd per curiam sub nom. *United States v. International Hod Carriers,* 313 U.S. 539 (1941); *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.,* 311 U.S. 91, 98-99 (1940). Indeed, neither management

nor labor could refuse to bargain about such subjects. National Labor Relations Act §§8(a)(5), (b)(3), (d), 49 Stat. 452 (1935), as amended 29 U.S.C. §§158(a)(5), (b)(3), (d) (1959). On matters outside of the mandatory area, however, no such considerations govern because the national labor policy does not require management and labor to bargain about them.

In light of the foregoing, we conclude that the unions' establishment of price floors on orchestral engagements constitutes a per se violation of the Sherman Act. The price of orchestral engagements is not a subject of such direct and overriding interest to the unions, as representatives of sidemen and sub-leaders, that it is a mandatory subject of collective bargaining; and the unions' representation of orchestra leaders, whom this court has held to be employers in the field under consideration, cannot serve as a basis for its establishment of uniform price floors. See *Los Angeles Meat & Provisions Drivers Union v. United States,* 371 U.S. 94 (1962); *United States v. Women's Sportswear Manufacturers' Association,* 336 U.S. 460 (1949); *Columbia River Packers Association, Inc. v. Hinton,* 315 U.S. 143 (1942); *Local 36 v. United States,* 177 F.2d 320 (9 Cir. 1949).

The arguments that musicians are interested in the prices charged by their employers, because they form the boundary of the wages they can expect to receive is not persuasive because it would justify an invasion of the proper function of management, which, with few exceptions, would go beyond any balancing of the labor and antitrust laws and effect the complete paralyzation of the latter. See *Hawaiian Tuna Packers, Ltd. v. International Longshoremen's Union,* 72 F. Supp. 562 (D. Haw. 1947). The same principle would support union-instigated price-fixing in any industry.

Appellees also argue, in justification, that historically many orchestra leaders have been financially irresponsible,

and the only way to assure that sidemen will be paid is to make certain that orchestra leaders have profits. But, while the history of an industry has a bearing upon whether a subject is of direct interest to labor unions, see *Greenstein v. National Skirt & Sportswear Ass'n, supra;* cf. *Fibreboard Paper Products Corp. v. N.L.R.B.,* 379 U.S. 203 (1964), such assurances that leaders will pay their sidemen can be achieved by means much less drastic than price fixing.

To be distinguished from the present action are cases like *Local 24 v. Oliver, supra.* There the union was permitted to compel a carrier to pay certain wages to its employees and also to pay a profitable rental to owner-drivers, who were independent contractors performing the same function as union members. The prices received by the owner-drivers were a term or condition of employment of the union members, because "an inadequate rental might mean the progressive curtailment of jobs through the withdrawal of more and more carrier owned vehicles from service." 358 U.S. at 293-294. Cf. *Milk Wagon Drivers' Union v. Lake Valley Products, Inc., supra.* Here, the attempt to establish price minima, when orchestra leaders do not actually perform with their orchestras, cannot be justified on the ground that there is job or wage competition or any other economic interrelationship between them and other employees represented by the unions. See. *Los Angeles Meat and Provision Drivers Union v. United States, supra* at 103. The establishment of price floors by union fiat may seem to be a different matter, however, when the orchestra leader actually performs with his orchestra. In that situation the services of a sub-leader would not be required and the leader may in this way save the wages he would otherwise have to pay. Consequently, he could make the services of his orchestra available at a lower price than could a non-performing leader.

The cases make it clear, however, that price-fixing generally is not only not a mandatory subject for collective

bargaining but is one toward which union activity may not be directed without violating the anti-trust laws. The unions assert that in this case the price-fixing is essential to the mandatory subject of job protection, as it was in *Local 24 v. Oliver, supra;* but in that case the union members were faced with the probability that, if a particular minimum price were not charged as rent by the owner operators of the vehicles, the employee-drivers, who were members of the union, would have to accept substandard wages or see their jobs entirely "contracted out" by the employer.[9] The circumstances constituting a possible threat to the employment of sub-leaders or the displacement of a sideman in the present case are not at all comparable. Nor is there any authority for holding that an employer must bargain on a labor union's demand that the employer perform no work himself which an employee could do. Moreover, many leaders become so because of their skill and reputation in playing certain instruments and their performances with their orchestras enhance the demand for the orchestras and provide more work for employees rather than less as is the case of "contracting out." See *Fibreboard Paper Products Corp. v. N. L. R. B., supra,* at pp. 220-225 (Stewart, J. Concurring).

Issues quite different in nature from price-fixing are raised by the appellants concerning travel restrictions and employment quotas, because both are mandatory subjects of collective bargaining and reflect union interest in maintaining the job market. See *United States v. American Federation of Musicians, supra; United States v. Carrozzo, supra.* Cf. *Fibreboard Paper Products Corp. v. N. L. R. B., supra.* Moreover, local unions have a direct interest in pro-

[9] A labor union may insist, of course, that employers "contract out" no work which is otherwise performed by union members. *N.L.R.B.* v. *Adams Dairy, Inc.*, 379 U.S. 646 (1965), reversing 322 F.2d 553 (8 Cir. 1963); Fibreboard Paper Products Corp. v. N.L.R.B., supra; Town & Country Manufacturing Co. v. N.L.R.B., 316 F.2d 846 (5 Cir. 1963) enforcing 136 NLRB 1022 (1962).

tecting the job market for their workers, cf. *Rambusch Decorating Co. v. Brotherhood of Painters,* 105 F.2d 134 (2 Cir.), cert. denied 308 U.S. 587 (1939), so that a music purchaser, for example a recording company, cannot refuse to bargain on a union's demand that only musician-employees who belong to the local union be employed. Cf. *N.L.R.B. v. Bradley Washfountain Co.,* 192 F.2d 144, 154 (7 Cir. 1951); *N.L.R.B. v. Andrew Jergens Co.,* 175 F.2d 130, 134 (9 Cir.), cert. denied 338 U.S. 827 (1949) (Union shop held mandatory subject of collective bargaining.) In the present case, since the employers do not remain within the jurisdiction of any local when they are traveling, the only realistic way to achieve local security is through the enforcement of restrictions by the national union. See *Rambusch Decorating Co. v. Brotherhood of Painters, supra.* As neither the travel restrictions nor the employment quotas were instituted in furtherance of a conspiracy with a non-labor individual or group, they are immune under the Norris-LaGuardia Act.

Appellants' contention that the Federation is an unlawful monopoly involves the claim that its achievement of a closed shop violates the Sherman Act. A closed shop dispute, however, concerns a "term or condition of employment", and therefore is exempt. See *United States v. American Federation of Musicians, supra.* Cf. *N.L.R.B. v. Bradley Washfountain Co., supra; N.L.R.B. v. Andrew Jergens Co., supra.* As a union's pursuit of a closed shop is protected, the accomplishment of its objective cannot be declared to be a violation of the Sherman Act. See *Kolb v. Pacific Maritime Ass'n,* 141 F. Supp. 264 (N.D. Cal. 1956). See generally *Apex Hosiery Co. v. Leader, supra; United States v. Gold,* 115 F.2d 236 (2 Cir. 1940). Rather, the elimination of price competition based upon inequality of labor standards is a legitimate and recognized objective of any national labor organization. See *United Mine Workers v. Pennington, supra* at 666; *Apex Hosiery Co. v. Leader,*

supra at 503; Cox, Labor and the Antitrust Laws—A Preliminary Analysis, 104 U. Pa. L. Rev. 252, 254-255 (1955).

The appellants also contend that the unions merely by requiring orchestra leaders to use their Form B contract violate the anti-trust laws. This contract serves primarily as a reporting device which enables them to insure against violations of wage scales and other regulations. The use of such a standardized contract, without more, does not under ordinary circumstances constitute an unreasonable restraint of trade; if there are specific provisions in it which do, the complaint should so allege. Of course, the contract form provided for the club date field must, consistently with this decision, omit any provision which would, in effect, constitute price-fixing.

The charges concerning the unions' refusal to bargain with orchestra leaders and their activities in putting pressure on them to become union members constitute allegations of prima facie violations of the National Labor Relations Act. See Labor Management Relations Act of 1947, 61 Stat. 140, adding §§8(b)(3) and 8(h)(4)(ii)(A), 29 U.S.C. §§158(b)(3), (b)(4)(ii)(A) (1959). Whether unfair labor practices were committed, however, must be considered in the first instance by the National Labor Relations Board on complaint of the General Counsel. The only question before us is whether the same practices also infringe the Sherman Act. We conclude that they do not. A labor union's refusal to deal has been held to be exempt in the absence of a conspiracy with businessmen. *Hunt v. Crumboch,* 325 U.S. 821 (1945). Moreover, the purpose behind the unions' action makes it apparent that there is no violation involved. Unlike *Hunt v. Crumboch, supra,* at 826, et sec. (dissenting opinions), refusal to bargain here is not aimed at eliminating a competitor from the product market, but rather at achieving uniformity of labor standards.

The exertion of pressure on orchestra leaders to join the union reflects a legitimate union concern for the closed shop and is not to be confused with cases in which labor unions have imposed membership upon employers who do not present job threats to union members. See, *e.g.*, *Los Angeles Meat & Provision Drivers v. United States, supra; United States v. Fish Smokers' Trade Council, Inc.*, 183 F. Supp. 227 (S.D.N.Y. 1960). The same orchestra leaders who are "employers" in the club date field are very often "employees" when they perform as sidemen or sub-leaders or when in other fields the purchaser of music is actually the employer. Moreover, even those orchestra leaders who, as employers in club dates, lead but never perform as players, are proper subjects for membership because they are in job competition with union sub-leaders; each time a non-union orchestra leader performs, he displaces a "union job" with a "non-union job." *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc., supra.* Although there might be no such justification in the case of one who managed an orchestra but who never performed as a leader or player, we need not reach that question since Judge Levet found that no significant pressure to become members has been exerted by the union on Carroll and Peterson, the two plaintiffs who manage orchestras but do not perform.

Union by-laws prohibit the members from accepting engagements with or making any payments to caterers. Whether such a regulation is exempt from the Sherman Act may depend upon the effect on the terms and conditions of union members' employment of the bookings with, and kickbacks to, caterers. But the appellants have not shown that they were injured by the regulation. There is nothing in the record which tends to establish that the appellants suffered a loss or reduction in engagements or that they were confined to less profitable contracts because

of their inability to deal with caterers. The appellants, therefore, lack standing to challenge the lawfulness of the regulation. Clayton Act §4, 38 Stat. 731 (1914), 15 U.S.C. §15 (1959).[10]

The objection to the unions' regulation of booking agents fails for a like reason. Their proscription of booking agents who deal with non-union musicians is clearly exempt on the same ground as the maintenance of a closed shop. The unions, however, also establish ceilings on booking agents' commissions. These provisions might deny some orchestra leaders the opportunity to bid competitively for engagements offered by booking agents, but there is no proof that the appellants attempted to offer booking agents a higher commission or that they would do so if given the chance. Consequently they lack standing to raise this issue.

The judgment of the district court is affirmed except for the price-fixing charge. The case is remanded to the district court to fashion an order enjoining the unions from enforcing the price restrictions against the four appellants and for a determination of what damages, if any, they have suffered.

The resulting judgment should provide that no costs will be taxed against any of the parties.

FRIENDLY, Circuit Judge (concurring and dissenting):

Agreeing with so much of Judge Anderson's excellent opinion as affirms rulings of the District Court, I must dissent from the portion that reads for reversal I do this with hestitation since the line between those forms of union activity that are permissible and those that run afoul of the antitrust laws is anything but bright. In my view, however, the majority have failed to take adequate account of characteristics of the business here before us that render

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[10] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . ."

it *sui generis,* as Judge Levet with the years of experience gained from handling this and related actions, see fn. 1 to the majority opinion, has so thoroughly appreciated.

If club dates were always or almost always handled by non-performing leaders who devoted themselves exclusively or mainly to that activity, I would agree that fixing a minimum spread between the price paid by the buyer and the expenses incurred by the seller was not a "legitimate object" of union activity within the shelter of §§ 6 and 20 of the Clayton Act read in the light of § 4 of the Norris-LaGuardia Act. Such cases, however, are simply a rather small point at one end of a spectrum. Beginning with the single sideman "leading" himself, this ranges through the sideman who picks up two or three engagements a year as leader of a larger group, the performer who spends a fair portion of his time as a leader, the musician who does nothing but lead, and the exclusive leader having several bands with engagements at the same time,[1] up to the few "leaders" who have ceased to lead at all. Obviously this means a higher degree of interchangeability in work functions and competition among union members for posts as leaders.[2]

The provisions my brothers condemn as offending the Sherman Act is that a leader must obtain an extra fee—25% of his scale when he leads himself, 50% when he leads another, 75% when he leads two others, and 100% when

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[1] In all these categories the leader usually plays an instrument at least part of the time when he is leading.

[2] An exhibit showed that for the period April 1-December 31, 1960, 6589 of Local 802's 30,000 members acted as leaders for club dates. A group of 118 leaders each had from 51 to more than 200 engagements, and a second group of 208 had from 21 to 50. On the other hand, 2789 acted as leader only once, 3062 from 2 to 9 times, and 608 from 10 to 20. Although appellants regard these figures as showing that the first two groups stand apart from the others, they seem to me to show the contrary.

he leads three or more others—plus 8% of the aggregate scale wages to cover social security and unemployment insurance taxes and bookkeeping. Taking the first case first, I fail to see why protecting the member who wants to make an extra charge of 25% when he assumes the additional burden of getting an engagement against being undercut by others willing to forgo it is not as legitimate a union objective as setting a differential for a sideman's playing more than one instrument or engaging in rehearsal. As the size of the band increases, the time and cost of obtaining engagements, picking the sidemen, and making sure they are on hand at the appointed time and place also grow. If the union wants to see that such services are compensated rather than have some members perform them without remuneration for their time, effort or out-of-pocket expenses, this objective does not cease to be "intimately connected with wages, hours and working conditions" and thereby without the protection from the antitrust laws afforded by the Clayton Act, see Local 189, Amalgamated Meat Cutters Union v. Jewel Tea Co., 381 U.S. 676, 689-690, 85 S.Ct. 1596, 14 L.Ed.2d 640 (1965) (White, J.), either because we have held the leader to be an "employer" within § 302 of the Labor Management Relations Act, Carroll v. American Federal of Musicians, 295 F.2d 484, 486 (2 Cir. 1961); Cutler v. American Federation of Musicians, 316 F.2d 546 (2 Cir.), cert. denied, 375 U.S. 941, 84 S.Ct. 346, 11 L.Ed.2d 272 (1963), or because the arrangements between the leader and the father of the bride are not themselves within the national labor policy. The fact that the leader is in part an entrepreneur does not deprive the union of a legitimate interest in his earnings up to the point where his services both as a performing artist and as a salesman and manager have been adequately compensated. Whether Local 189, Amalgamated Meat Cutters Union v. Jewel Tea Co., supra, ultimately comes to mean that employer-union agreements on mandatory subjects of collective bargaining are generally or are always exempt from the antitrust

laws, to read that case as establishing that only such union activities enjoy exemption would be a serious misunderstanding. Where, as here, the union rule merely sets a floor under the price at which one union member may sell his services to customers in competition with others, the union needs no such special justification as it did in *Jewel Tea* for regulating what would ordinarily be management prerogatives of independent businessmen employing union members. See Los Angeles Meat & Provision Drivers Union v. United States, 371 U.S. 94, 103 and 104-108, 83 S.Ct. 162, 9 L.Ed.2d 150 (concurring opinion of Mr. Justice Goldberg) (1962); cf. Local 24, Int'l Bhd. of Teamsters, etc. v. Oliver, 358 U.S. 283, 79 S.Ct. 297, 3 L.Ed.2d 312 (1959). A different result might be warranted if the floor were set so high as to cover not merely compensation for the additional services rendered by a leader but entrepreneurial profit as well. But there has been no such showing here.

I would affirm the dismissal of the complaint.

APPENDIX B

U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

CARROLL et al. v. AMERICAN FEDERATION OF MUSICIANS OF UNITED STATES AND CANADA et al., Nos. 60-2939 and 60-4926, May 17, 1965

LEVET, District Judge:—The plaintiff-orchestra leaders claim that the defendants American Federation of Musicians of the United States and Canada ("Federation" or "AFM") and Associated Musicians of Greater New York Local 802 ("Local 802") have violated the antitrust laws. I have endeavored to categorize the multitude of alleged violations, making a sufficient number of Findings of Fact in each category to adequately define them. I have not found it either necessary or desirable to include every union regulation which might possibly be included in each category. The dispute in this case centers primarily on the applicable law and the interpretation to be given to the facts, rather than the facts themselves.

The court directed a consolidated trial in 60 Civil 2939 and 60 Civil 4926. The single set of Findings of Fact and Conclusions of Law relates to both actions.

Since the class suit was not sustained, this opinion relates exclusively to the plaintiffs in the action. Nevertheless, the court has found evidence persented as to other orchestra leaders who in certain respects are similarly situated to the plaintiffs relevant in making findings relating to some of plaintiffs' practices.

The parties stipulated that the testimony in 60 Civil 1169 and 60 Civil 4025 is part of the record in this case (1019-20). Consideration of damages was reserved for a time subsequent to the decision on liability.

This case having been tried, the court, after considering the pleadings, evidence, exhibits, briefs and stipulations of the parties and the proposed findings of fact and conclusions of law, makes the Findings of Fact and Conclusions of Law listed belo v.[1]

FINDINGS OF FACT

I. THE PARTIES

A. Plaintiffs

1. Plaintiffs Joseph Carroll, Charles Peterson, Ben Cutler and Marty Levitt, at all times relevant herein, were and are orchestra leaders, and at the commencement of these actions were members of defendants AFM and Local 802. Neither Carroll nor Peterson is presently a member of defendant unions (Stipulated Fact 1).

2. Plaintiffs Charles Turecamo and Dan Terry have withdrawn from the action.

3. At all times relevant herein, plaintiff Peterson was an employee of corporations known as Charles Peterson Theatrical Productions, Inc. ("Peterson, Inc.") and Carlton M. Hub, Inc. ("Hub, Inc."). Peterson was the sole stockholder of Peterson, Inc. and now controls Hub, Inc. (1755, 1983-84). Peterson always handled his musical engagements through Peterson, Inc. until recently when he began to use Hub, Inc. to (1756, 1983, 1986, Exs. GB, GG, GD).

4. Plaintiff Peterson was expelled from the defendant unions for various reasons, including his failure to abide by the union minimum wage scale (2117-18; Exs. FR-FY).

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[1] References to "Stipulated Fact" are to those stipulated facts set forth in paragraph 3 of the pre-trial order herein. References to a number, "Ex." followed by a number, and "Ex." followed by a letter, are to the stenographer's minutes, plaintiffs' exhibits and defendants' exhibits, respectively. References to "St. Min." followed by a number are to pages in the stenographer's minutes of the trial of 60 Civil 1169 and 4025, which, pursuant to stipulation is part of the record in this action. "F.F." indicate Findings of Fact.

5. Plaintiff Carroll was expelled from Federation for failing to furnish Local 38 of the Federation with information pertaining to an engagement which he performed in Westchester County. He was also expelled by Local 802 for violation of various of its By-Laws, including his failure to abide by Local 802's wage scales (Carroll v. Associated Musicians of Greater New York, Local 802, 52 LRRM 2950 [S.D.N.Y. 1963]).

6. There is no evidence that plaintiff Orchestra Leaders of Greater New York ("OLGNY") has in any way been damaged or aggrieved by any conduct of defendants or that it has any interest in these actions (see Stipulation of plaintiffs' counsel in letter to this court dated November 13, 1964).

7. Plaintiff Levitt performs services on club dates (577) and on steady engagements in hotels and ballrooms (564, 571).

8. Substantially all of plaintiff Cutler's services are performed in the club date field (2227). He has also made one or two recordings and appeared on one television program (2560; St. Min. 83-84; Exs. 310, DR). In the steady engagement field he has performed in hotels, restaurants and nightclubs (2227; St. Min. 70-71).

9. Plaintiff Peterson is primarily engaged in the club date single engagement field. He has also worked in concerts and in the steady engagement field in certain hotels and dance halls between 1945 and 1950 (1742-43; St. Min. 854-858).

10. Plaintiff Carroll is "almost exclusively" engaged in the club date single engagement field. He served as a leader in the steady engagement field at the Stork Club between 1945-48 (1425).

11. The plaintiffs in practicing their professions:

(a) maintain their own offices where they employ steady and/or part-time employees (567; St. Min. 71, 76-81, 258-59, 347, 360);

(b) acquire business as a result of their own contacts, reputations, and personal solicitations (567; St. Min. 78-79, 261-62, 360);

(c) engage in and pay for advertising (567; St. Min. 80-85, 87, 127-128, 261-262, 360) and prominently display their names wherever their engagements are played, thus indicating that the orchestra is, e.g., the Charles Peterson Orchestra (St. Min. 116, 260, 347).

12. Because of Carroll's and Peterson's expulsions from the union, they were thereafter precluded from actively taking part in their engagements either as conductors or instrumentalists (1777-79, 1936-37, 2039-44, 2110-12). (See F.F. XV.)

B. The Defendants

13. Defendant Local 802 is a labor union affiliated with the defendant Federation and with the AFL-CIO. The territorial jurisdiction of defendant Local 802 consists of the five boroughs of New York City and Nassau and Suffolk Counties (Ex. CJ, Section 6, p. 5; St. Min. 80-81, 453).

14. Local 802 has over 30,000 members. They perform musical services as conductors, instrumentalists, arrangers and copyists. Local 802 represents, and has traditionally represented, among others, members who are orchestra leaders, subleaders and sidemen, and has collective bargaining agreements with various employers (Stipulated Fact 2).

15. Membership in a local affiliated with Federation implies membership in the Federation (Stipulated Fact 4).

16. Defendant Federation is a labor union affiliated with the AFL-CIO and it consists of 683 local unions (including defendant Local 802) located throughout the United States and Canada (Stipulated Fact 5).

17. Defendant Federation has over 260,000 members, who perform musical services as conductors, instrumentalists, arrangers and copyists. The Federation represents, and

has traditionally represented, among others, members who are orchestra leaders, subleaders and sidemen, and has collective bargaining agreement with various employers (Stipulated Fact 6).

18. Almost all orchestra leaders and sidemen in the United States are members of AFM or one of its locals (84, 164-65, 1105).

19. The AFM publishes and is governed by its "Constitution, By-Laws and Policy" (Exs. 300, 12, 160, 161, 162, 163, 164, 164a, 164b). Likewise, Local 802 publishes and is governed by its Constitution and By-Laws (Exs. 165-172, 141, 29) and other booklets including Price Lists and Wage Scale Booklets (Exs. 173-195, 205-209, 306).

20. Defendants Al Manuti, Max L. Arons and Hyman B. Jaffe are President, Secretary and Treasurer, respectively, of defendant Local 802 (Stipulated Fact 3).

21. Defendants Herman D. Kenin, Stanley Ballard and George V. Clancy are President, Secretary and Treasurer, respectively, of the defendant Federation (Stipulated Fact 7).

22. There is no evidence that any of the defendants who are officers of the defendant unions have committed, as individuals, any of the acts complained of by plaintiffs.

23. The defendants Al Manuti, Max L. Arons and Hyman B. Jaffe, together with other members of Local 802, are members of Local 802's Executive Board (the "Executive Board") (Ex. CJ, Section 4, p. 5).

II. Definitions

24. "Single engagements" are engagements generally for one day, but always for less than one week (Stipulated Fact 8). All other engagements are referred to as "steady engagements" (id.).

25. For convenience of reference in this opinion, certain types of engagements sharing some common characteristics

will be referred to as groups. Thus, a "club date" is a single engagement such as a wedding, commencement, bar mitzvah, debutante party, fashion show, or other social event (Stipulated Fact 8; St. Min. 69, 242-43, 438, 457-59, 806). Steady engagements at hotels, nightclubs, dance halls or restaurants will be called "hotel" steady engagements. Single engagements other than club date single engagements (3108, 3183-84, 3830-31, 3841), e.g., TV, recording, and all steady engagements, will be referred to as the "non-club date" field.

III. Music Industry Generally

26. Members of defendant unions perform services as orchestra leaders, subleaders and sidemen on club dates and for hotels, restaurants, nightclubs, recording companies, broadcasting companies, theatres, steamships, and for The Radio City Music Hall, The Metropolitan Opera, The New York Philharmonic Society, and The City Center of New York (see F.F. I(A), supra, III, XIV, infra).

27. Plaintiffs and intervenors are in a market for musical services which includes states other than New York, as well as New York (1425, 2227, 2231).

28. Musical employment is highly casual, and except for employment by symphonic orchestras, a few opera societies and on staffs of network owned radio and television broadcasters, job tenure and enduring employer-employee relationships rarely exist (3673).

29. Musicians do not confine their activities to any one musical field. They seek engagements and perform services in any musical field where job opportunities exist (3291-96, 2156, 2159-65, 2417-18, 2875, 2889-90, 1159, 1160, Ex. CR). Thus, musicians who perform services as orchestra leaders, subleaders and sidemen in the club date field also perform services in non-club date fields (1160, 1314-15, 2417-18, 3074-75, 3291-96, 3661-62). Conversely, musicians who perform in the non-club date fields also work as leaders, sub-

leaders, or sidemen in the club date field when they are not otherwise engaged (564, 571, 1818, 1820, 1860, 1927-29, 2154-57, 2159-65, 2227-28, 2290-91, 2417-18, 2430, 2889-90, 3074-75, 3291-96, 3661-62).

30. The number of steady engagements is a small minority of the total number of engagements, single and steady (274-75, 350-51, 3108-09).

IV. Leaders Generally

31. Orchestra leaders, including plaintiffs, conduct at engagements at which they personally appear (839-41, 960, 1311, 1427; St. Min. 116, 393).

32. Conducting is a musical service and orchestra leaders, when conducting, fulfill the same function, whether they are "employers" (for any purpose) or "employees" (Stipulated Fact 11), and whether they are working in the single engagement or the steady engagement field (578-79, 713-16, 1054-56, 1182-83, 3535-36).

33. Only a relatively small group of musicians act as leaders all or virtually all the time. Plaintiffs are included in this group (3666-67; Ex. 58).

V. Job or Wage Competition or Other Economic Interrelationship Between Leaders and Other Union Members

A. Interrelationship between leaders and sidemen who occasionally lead

34. A considerable number of musicians act only occasionally as leaders and act as sidemen the rest of the time (Exs. K, L, M; Stipulated Fact 10).

35. Such musicians who work as sidemen in club date or non-club date fields perform as leaders in the hotel steady and club date fields. They bid for the same jobs as full-time leaders such as plaintiffs and perform the same musical service when they get a job. They also perform in the same

places as full-time leaders (2291, 2553-54, 2571, 2395-96, 2411-12, 2422-23, 2427, 2428-30, 2874-75, 2889-90, 2894, 3038-40, 3052-54, 3088-89, 3293, 3653-54, 3666-68, Exs. 58 DE, pp. 188-89, HE; F.F. 29).

B. Interrelationship between leaders and subleaders

36. Plaintiffs belong to a group of orchestra leaders operating primarily in the club date field and occasionally in the hotel steady field who regularly use subleaders for their engagements. They generally do this when they accept simultaneous engagements for more than one orchestra. Subject to instructions which are sometimes given by the leader, the subleader performs all the musical services which the leader would have performed had he been present (327, 565-66, 573, 582, 607, 616-17, 812, 826-27, 708, 838, 965, 1010-11, 1193-94, 1864-66, 1896, 2604-06, 3045; St. Min. 73, 76, 130-31, 176, 276, 307, 314, 393, 801, 873-74).

37. Subleaders are employees (conceded by plaintiffs in marking defendants' proposed findings of fact).

38. Each time plaintiffs personally conduct an orchestra in the hotel steady and club date fields, they displace the services of a subleader who would otherwise have been engaged to conduct the orchestra (583-84, 565-66, 573, 582, 617, 704, 845, 812-14, 960-65, 1194, 1313, 1353, 1375-76, 1778-79, 2039-44, 2604-06; St. Min. 83-84; F.F. 36).

C. Interrelationship between leaders and sidemen

39. Instrumentalists who perform services in orchestras other than as leaders or subleaders are referred to as sidemen.

40. Sidemen are employees (conceded by plaintiffs in marking defendants' proposed findings of fact).

41. Almost without exception, all members of defendant unions who are now orchestra leaders (including the individual plaintiffs herein) worked as sidemen when they

joined defendant unions and continued to work as sidemen for a number of years thereafter (Stipulated Fact 13).

42. All members of Local 802 are entitled to have their names included in the directory of membership of Local 802 under whatever category they select. Each of the individual plaintiffs, while a member of the union, was included in the directory as an instrumentalist. For example, Cutler is listed under the heading "saxophone," and Carroll was listed under the heading "drums" (Stipulated Fact 9).

43. Plaintiffs other than Peterson (2039) belong to a group of orchestra leaders, operating primarily in the club date field and occasionally in the hotel steady field, who often, but not always, play musical instruments in addition to conducting at engagements at which they personally appear (524, 609-10, 826, 839-40, 957-58, 961-62, 1194, 1311-12, 1352, 1375, 1427, 2370; Ex. DE, p. 37; St. Min. 117).

44. An orchestra leader, in playing an instrument, fills a requirement for an instrument in the orchestra just as any sideman does (194-95, 842, 1313-14, 1353, 1375-76, 3054-55).

45. Each time plaintiffs play instruments in the hotel steady or club date field they displace the services of a sideman who otherwise would have been engaged to play the same instrument that the particular plaintiff played (F.F. 43, 44; 609-10, 842, 958-62, 1194-95, 1313-14, 1353, 1375-76, 1778-79, 3657).

VI. Employment Relation in Television and Radio.

46. For many years Federation has entered into collective agreements with the three major television and radio broadcasting networks, viz., Columbia Broadcasting System, Inc., American Broadcasting-Paramount Theatres, Inc., and National Broadcasting Company, Inc. In addition, Local 802 enters into collective bargaining agreements with stations owned by the networks and with various other independently owned stations, including WPIX (Exs. BLI-4, BM, BN, BT, IO, IP, KJ, KM).

47. The networks agreements result from joint negotiations with the three networks and similar individual collective bargaining agreements are entered into with each of the three networks (2258-66).

48. The network collective agreements relate primarily to two areas of broadcasting, viz.:

(a) live and video tape broadcasting (Exs. BL 1-4) under an agreement dated May 18, 1964, for a term commencing March 1, 1964, and ending June 30, 1966; and

(b) the recording of musical services on television film (Ex. 10) pursuant to an agreement dated May 1, 1964, for a term commencing May 1, 1964, and ending April 30, 1969 (2258-59).

49. The cost of furnishing music is a considerable expense to the networks and other broadcasting stations (2258, 2302).

50. Pursuant to collective agreements, each of the network broadcasting companies engages approximately 100 musicians, including orchestra leaders, who perform services on a regular annual basis (2262-63, 2268-69, 2305-06; Ex. BL 1-4). The musicians so engaged are generally referred to as "staff musicians" (2264, 2268-69). The networks, in addition, also employ musicians on a single engagement basis (2264, 2292-93, Ex. BL 1-4).

51. With regard to the services of musicians, whether employed either on a staff or a single engagement basis, each network broadcasting company, through the director of music operations or producer of a show:

(a) hires the orchestra leader (2256-57, 2270, 2271, 2317);

(b) hires each of the sidemen (2256-57, 2271, 2272-73);

(c) decides, subject to union minimum requirements, on the number of leaders and sidemen who are to be engaged (2272-73);

(d) determines, subject to contractual obligation, the compensation of musicians (2326);

(e) selects the sidemen who will play for the orchestra leader (2272). (The musicians performing services for the broadcasting company play under the leadership of different orchestra leaders, some of whom are staff conductors and others, guest conductors (2269, 2277-78));

(f) determines the compositions to be played (2273-74);

(g) exercises control over the musical direction and decides how the orchestras are to render their pieces, including such things as tempo and variations in an arrangement (2275-76, 2280, 2311-12, 2319-20); sometimes the orchestra leader will provide guidance to the TV executive responsible for the program (2321);

(h) calls for rehearsals (2274);

(i) disciplines and discharges musicians who are unsatisfactory (2288-89, 2323; Ex. IP, pp. 13, 26);

(j) pays all expenses connected with the performances of the orchestras, including the cost of arrangements, the orchestra leader's salary, the sideman's salary, doubling, cartage fees, wardrobe allowance, extra compensation where makeup or costumes are required, transportation, insurance of instruments (2272-73, 2281-84, 2317; Exs. BL 1, 3, par. 5; BL 4, p. 9; IP, pp. 18, 20, 21; IO);

(k) furnishes paid vacations, meal periods and rest periods (2281-82);

(l) makes payments on behalf of the musicians to a pension welfare fund (Ex. BL 1, 3, par. 9; 2281);

(m) pays severance pay to laid-off musicians (2265).

52. The person vested with control over live and video tape broadcasts is the producer of the particular program involved. The producer of programs owned by the networks is an employee of the broadcasting company (2313-14).

53. Music for television films generally consists of background music which is inserted after the performance has already taken place and been captured on film. The persons responsible for the music on television film are the musical director and producer, both of whom are employed by the network broadcasting company (2284-86, 2319-20). The musical director, working in conjunction with the producer of a particular program, customarily does the following things with regard to the services of musicians:

(a) determines the type of music to be used in the film (2284-85, 2320);

(b) determines the persons who are to compose and arrange the music (2284, 2320);

(c) determines the orchestra leader to be used (2257, 2320);

(d) determines the sidemen to be used (2257, 2320);

(e) determines when the music is to be recorded on the tape which will be integrated with the film (2285-86); and

(f) supervises the integration of the music with the film so that the music sound tract is coordinated with the filmed action (2286-88).

54. The broadcasting companies withhold and pay over to the appropriate governmental agencies the usual employer deductions for all musicians, including orchestra leaders (2271). On rare occasions (less than six times a year for CBS), a broadcasting company engages the services on a name band and a lump sum is paid to the orchestra leader in payment for his services and the services of the sidemen performing with him (2297, 2299-2300, 2323).

55. The minimum union wages and working conditions relating to single engagements for networks are set forth in the collective agreements between the networks and defendant unions and are summarized in the booklet published

by Local 802 entitled, "Price List Governing Single Engagements Radio and Television" (Ex. GJ; 2327).

56. The broadcasting companies have effective control over the rendition of services by musicians engaged by the broadcasting companies (2276-77, 2284-85, 2288, 2313-14, 2317, 2321).

57. Plaintiff Cutler performed services as a leader for a telecast by Station WPIX, New York (Ex. DR-3). Plaintiff Cutler was paid by separate check and all employer deductions were made by Station WPIX (id.). There is no evidence that the degree of control exercised by the broadcasting company over the services of the musicians on Cutler's engagement differed from the control exercised by the broadcasting companies over musicians as set forth above.

VII. Employment Relationship in Recording

58. Federation has entered into collective agreements with manufacturers of home phonograph records ("recording companies"). An agreement with recording companies expired December 31, 1963, and at that time an understanding had been reached between Federation and the recording companies with respect to the terms of a new collective agreement, which has not yet been reduced to writing (134-35).

59. The collective agreement between Federation and recording companies covers upwards of 1,000 recording companies and includes every major manufacturer of records in the United States and Canada (Ex. FG-1).

60. Federation has been certified by the National Labor Relations Board ("NLRB") as the collective bargaining agent for all musicians, including orchestra leaders, who perform services for recording companies (Ex. BE).

61. Musicians perform services for recording companies on a single engagement basis (1527, 2757).

62. Recording companies are in the business of manufacturing phonograph records which embody musical performances of members of defendant unions (1465-66, 1504, 2752-53).

63. An employee of the recording company known as the "artist and repertoire representative" (the "A&R man") has the ultimate responsibility for the musical product embodied in the phonograph recording. He actively participates in and has the last word in determining the nature of the various elements which comprise the recorded performance. In exercising this control the A&R man generally consults with the arranger-conductor and/or the vocalist, if any (2754-62, 2768-69, 2770-72, 2775-76, 1482, 1496, 1499-1502, 1504-05, 1508-11, 1518-19, 1522).

(a) A substantial number, probably a majority, of the popular recordings made feature vocalists rather than orchestras (2754, 2769, 1523-24).

(b) The conductor of the orchestra used for recordings is also usually the arranger (2755, 1501-02).

64. The A&R man exercises the above-mentioned control over the following aspects of the preparation for the performance and the actual performance:

(a) selecting the orchestra leader (1501-02, 2754-55);

(b) determining the number and types of instruments to be used (1499-1501, 1518, 2754-55);

(c) employing a contractor to hire sidemen (the A&R man sometimes designates particular sidemen who are to be hired or avoided) (1518-19, 2756-58, 2762);

(d) deciding on the number and instruments of the musicians who are to perform (1503, 1518-19, 2754-56);

(e) determining the compositions to be played (1496, 1519-20, 2754-55);

(f) determining the seating arrangements and microphone placements for musicians (1504-05, 2758-60);

(g) determining when and where the actual recording session is to take place (1503-04, 2758, 2773); the recording session usually takes place at studios owned or leased by the recording company (id.);

(h) sometimes furnishing instruments to the musicians performing services (2764);

(i) determining the musical characteristics of the orchestra's performance including tempo, dynamics, tone coloring, volume, type of syncopation, and sometimes the nature of a sideman's performance (1508-11, 2761-62, 2763, 2775-76);

(j) sometimes requiring the addition of instrumentation to a recording after the original recording session ("sweetening"); often this subsequent sweetening takes place in the absence of the orchestra leader (1522).

65. All musical services must be performed to the satisfaction of the A&R man (1481-82, 1506-08, 1511, 2756, 2760, 2770, 2763). If the final recording does not meet with the approval of the A&R man, it will not be issued (1521, 2764).

66. The recording company pays compensation by individual checks payable to each of the musicians employed (2767-68, 2750; Ex. HP) or by a check payable to the leader or contractor for the total scale wages of leaders and sidemen which is transmitted to Local 802, less employer deductions (1491-91a, 1546-47, 2766-67). In the latter case, the recording company also sends a payroll record designating the gross and net amount payable to each musician (id.; Ex. EN).

67. The recording company withholds and pays over to the appropriate governmental agencies federal and state withholding taxes and social security taxes for all musicians, including the orchestra leader. The recording com-

pany also pays disability insurance for each of the musicians, including the orchestra leader (1494, 2750, 2786; Ex. HP). The recording company makes contributions to a pension welfare fund on behalf of each musician, including the orchestra leader (Exs. BS, pp. 29-30, EQ-ES).

68. Featured artists enter into royalty contracts with recording companies. Under those agreements there are deducted from the royalties otherwise owing to the featured artist, production costs such as wages paid to an orchestra leader; wages paid to sidemen; costs of arranging and composing, and the wages of choral groups (1541-42, 2784-86). If there are no royalties or an insufficient amount of royalties, the recording company bears these expenses without reimbursement (1542, 2784).

69. The recording company enters into a Form B Contract with the orchestra leader with respect to each recording session at which phonograph records are made (2765-66, Exs. DH, HO), which provides that the "employer [record company] shall at all times have complete control over the services of employees under this contract and the leader shall, as agent of the employer, enforce disciplinary measures for just cause, and carry out instructions as to selections and manner of performance" (id.).

70. Cutler performed as a leader in the making of a recording (St. Min. 83-84). There is no evidence that Cutler's manner of performance and the degree of control by the recording company differed from that referred to above.

71. Paragraph 12(d) of the collective bargaining agreement between the recording companies and defendant unions provides (Ex. BS):

"All present provisions of the Constitution, By-Laws, rules and regulations of the Federation (except those relating to requiring membership in the Federation) are made a part of this agreement to the extent to which their inclusion and enforcement as part of this agreement are not

prohibited by any present existing and valid law. No changes in the Federation's Constitution, By-Laws, rules and regulations which may be made during the term of this agreement shall be effective to contravene any of the provisions hereof."

72. The recording company has genuine and effective control over the rendition of services by musicians engaged by it including the orchestra leader.

VIII. Minimum Price Regulations

73. Local 802's "Price List" Booklet requires each sideman to be paid minimum wages for single or steady engagements. Their wages are based upon a number of factors, including the type of engagement involved; the number of hours played; whether the sideman plays more than one instrument; whether playing is continuous or non-continuous; whether the musician has to transport certain bulky instruments; whether the musician is required to furnish an organ or music folios; whether the musician is required to rehearse; whether there is a show lasting more than twenty minutes; and whether uniforms (other than tuxedos) must be furnished by the musicians (Stipulated Fact 14).

74. Local 802's "Price List" Booklet requires each leader to receive certain minimum compensation for the services rendered by him. Thus, Rule 1 of the Price List Booklet provides as follows:

"Rule 1. 'Regulations for Establishing Leaders' Fees in Single Engagement Unless Otherwise Provided For.'"

"A. An engagement played by one member shall charge in addition to the Union Scale of the engagement 25 per cent additional as Leader (Personnel Manager) fee.

"B. An engagement played by two members shall charge in addition to the Union scale of the engagement 50 per cent additional as Leader (Personnel Manager) fee.

"C. An engagement played by three members shall charge in addition to the Union scale for the engagement 75 per cent additional as Leader (Personnel Manager) fee.

"D. Where four or more men are employed the Leader shall charge and receive double the regular scale, i.e., 100 per cent additional as Leader (Personnel Manager) fee." (Stipulated Fact 17.)

75. Similarly, Local 802's "Price List" Booklet provides as to steady engagements:

"RULE 10. On all steady engagements the Leader (Personnel Manager) shall charge 25 per cent additional when only one (1) man is employed, 50 per cent additional when two (2) men are employed, 75 per cent additional when three (3) men are employed, and for all engagements of four (4) men or more he shall charge double the price per man, except where otherwise provided." (Stipulated Fact 18.)

76. Local 802's "Price List" Booklet provides that the subleader shall receive the following as his minimum wage for single engagements:

"RULE 2. In the absence of the Leader (Personnel Manager), the member representing him for any part or all of the engagement shall receive one-half the extra charge made in conformity with Rule 1, unless otherwise provided.

"A. On all outside (Single) engagements, on which the orchestra is called upon to rehearse and/or play a show and for which there is an extra charge. The Musician who actually conducts the rehearsal and/or show shall receive double the extra charge regardless as to who contracts the engagement, number of musicians employed or who stands in front of the orchestra." (Stipulated Fact 24.)

77. Similarly, in connection with steady engagements the "Price List" Booklet provides:

"RULE 11. In the absence of the Leader (Personnel Manager), the member representing him for all or part of the

engagement shall receive one-half the extra charge made in conformity with Rule 1, unless otherwise provided." (Stipulated Fact 25.)

78. Thus, the subleader must receive as his minimum wages for conducting a four-piece band on a single engagement, one and one-half times the sideman's scale, or double the sideman's scale if a rehearsal or show is involved. (Stipulated Fact 26.)

79. Local 802 not only establishes minimum compensation for sidemen and orchestra leaders on single and steady engagements, but also requires orchestra leaders to charge purchasers prices which are not less than the aggregate of the minimum compensation payable to sidemen and leaders (Exs. 178, 179, 186-195; Stipulated Fact 27).

80. Other locals also set per man and leader minimum wages (Exs. 173-77).

81. The resolutions of May 17, 1960, and October 27, 1960:

(a) In the club date field establishments are classified by Local 802 as "Class A" or as "Special Class." Class A rates are higher than Special Class.

(b) In March 1960, resolutions were submitted by members of Local 802 for consideration at the April Price List meeting. One of the resolutions so submitted provided that the minimum scale wages of sidemen performing services on Class A club dates would be increased (Ex. Q).

(c) The April 1960 Price List meeting was scheduled to take place on April 18, 1960. Prior to the April Price List meeting, plaintiff Cutler, as well as other leaders, made known to Local 802 officers objections to the adoption of the proposed resolutions (1229-30, 1397-1402).

(d) The April Price List meeting was adjourned for lack of a quorum (Ex. LI). The Executive Board, on May 17, 1960, passed the resolutions referred to above, to become

effective with respect to club date engagements booked after June 15, 1960 (Exs. LI and JQ). Such action was taken pursuant to a standing resolution in the By-Laws granting to the Executive Board authority to adopt price list resolutions where they were not acted upon at a price list meeting because of the absence of a quorum (3263; Ex. 12, Section 3, p. 57).

(e) After the increase in rates for club date Class A engagements became effective, members of Local 802 appeared and requested that Special Class engagement minimum rates be increased in order to maintain the traditional differential between Class A and Special Class club date engagements (3264-65).

(f) On October 29, 1960, the Executive Board adopted a resolution increasing the rates of Special Class club dates (Stipulated Fact 16; Ex. CE).

82. Local 802, in order to insure that minimum wages and other working conditions are being observed, employs approximately 30 business representatives whose function it is to visit establishments at which members of defendant unions are engaged (622-23, 666, 3834).

83. Local 802 also furnishes to its members in certain fields (e.g., the club date field, the broadcasting field) "Price List" booklets which set forth the minimum wages and working conditions in those fields.

IX. Minimums

84. Local 802 has regulations requiring the employment of minimum numbers of musicians for the various rooms of hotels, catering establishments and ballrooms in the club date single engagement field. These regulations vary according to the establishment, function, day and time and apply to all club date single engagements attended by more than 75 persons (Exs. 178-185; 3238-39).

85. Federation and Local 802 have been parties to collective agreements with the purchasers of music for certain steady engagements pursuant to which the purchasers have agreed to employ a specified number of musicians (Network Television Agreement, EX BL 1-3; Radio City Music Hall Agreement, Ex. BH; Philharmonic Agreement, Ex. BZ-1; Metropolitan Opera Agreement, Ex. CB).

X. Form B Contract

86. Article 13, Section 33, of Federation's By-Laws provides:

"Members of the A. F. of M. are not permitted to sign any form of contract or agreement for an engagement other than that issued by the A. F. of M." (Ex. 300).

The form of contract issued by the AFM is the Form B Contract (Exs. Y, Z, EC).

87. The Form B Contract was first adopted in 1941 (Ex. Y, Art. XVI, pp. 170-79). It was recommended in order that orchestra leaders could qualify for social security benefits (3375). The language of the Form B Contract was formulated after discussions with the Treasury Department (Ex. EC44-45) and then submitted to the Commissioner of Internal Revenue for a ruling on the question of liability for Social Security taxes (Ex. EC 45-46). The Commissioner ruled that the hotel employing the musicians in question was the employer for purposes of the Social Security tax (Ex. EC 47).

88. Since 1941, the Form B Contract has been amended from time to time and at present there are various types in use for different types of engagements. Each type designates the purchaser of the music as the employer and the leader as an employee (Exs. Z, Z-1, Z-2, DF-DI).

89. Article 16, Section 1A, of Federation's By-Laws provides that on traveling engagements (Ex. 300):

"A. Any individual member, or leader, in every case before an engagement is played, must submit his contract for same to the local union in whose jurisdiction same is played, or in the absence of a written contract, file a written statement with such local fully explaining therein the conditions under which same is to be fulfilled, naming the place wherein same is to be played, the amount of money contracted for, the hours of the engagement, as well as the names of the members who will play same and the locals to which they belong, the actual amount of money paid each individual sideman, which cannot be less than the wage scale specified in Article 15 of these By-Laws and (except in Canada) their Social Security numbers."

The written contract referred to is the Form B contract (Ex. 300, Art. 13, § 33).

90. Local 802, in practice, does not require the use of the Form B Contract on club date single engagements; it accepts reports (in person, by telephone, or by mail) of details of the engagement sufficient to show that union scale has been complied with. It also accepts contracts other than Form B Contracts (656-63, 3597-99). In addition, it accepts contracts (Form B or other types) which specify as the total price or wage "union scale" rather than any dollar amount (3597-3604, 3837).

91. Local 802 does require the use of the Form B Contract on steady engagements, although it does not insist that a Form B Contract be filed prior to every engagement (665-66).

92. Any member failing to use the Form B Contract, where it is required in practice, is subject to penalty (Stipulated Fact 30).

93. Local 802 requires that an engagement as a leader shall not be effective unless first approved by the Executive Board (Ex. 165, Art. 4, § 5).

XI. Regulations Pertaining to Traveling Members

A. 10% Surcharge

94. A tax called the "10% Traveling Surcharge" was assessed by the AFM on engagements played by members outside the jurisdiction of their home Local until 1964 (Ex. CM, Art. 15, § 1).

95. The 10% Traveling Surcharge was defined in the Constitution and By-Laws of the AFM as "An additional 10% based on the price of the Local in whose jurisdiction the engagement is being played * * * added to the price [of the engagement] * * *" (Ex. CM, Art. 15, § 3).

96. Federation's By-Laws provided that the leader was responsible for collecting and transmitting the traveling surcharge tax to Federation (Ex. CM, Art. 15, Sec. 7) and that the tax was to be distributed as follows: 4/10 was to be retained by Federation, 4/10 was to be paid to the local in whose jurisdiction the traveling engagement took place, and 2/10 was to be distributed to members of the orchestra playing the engagement (id.).

97. In April 1963, AFM's 10% Traveling Surcharge tax as it was then administered was held by the Second Circuit to violate Section 302 of the LMRDA in Cutler v. AFM, supra.

98. Federation's June 1963 Annual Convention adopted a resolution abolishing the traveling Surcharge tax, effective January 1, 1964 (Ex. LG).

99. At the June 1963 Convention, a new 10% wage differential on traveling engagements (the "Traveling engagement wage differential") was adopted. Article 15 of the 1964 Federation By-Laws provides that in the case of a steady traveling engagement the "minimum wage to be charged and received by any member" shall be "no less than the wage scale of the local in whose jurisdiction the services are rendered, plus 10% of such local wage scale";

and that, in the case of a single engagement, the minimum wage to be charged and received shall be "no less than either the wage scale of the local in whose jurisdiction the services are rendered or the wage scale of the home local of the member performing such services, whichever is greater, plus 10% of the wage scale of the local in whose jurisdiction the engagement takes place" (Ex. 300, Art. 15, § 2).

100. The purpose of the traveling engagement wage differential is to protect work opportunities for local musicians within their respective local union jurisdictions (3675, 3725-28).

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B. Illustration of Application of the Traveling Engagement Wage Differential-Engagements Performed by Local 802 Members in Local 38, Westchester

101. The Local 802 scale for club dates is higher than the union scale in the jurisdiction of Local 38, Westchester County, New York (741).

102. Pursuant to Article 15, Section 2, of Federation's By-Laws, members of Local 802 who perform club date single engagements in the jurisdiction of Local 38 in Westchester County are required to charge the Local 802 scale plus 10% of the Local 38 scale (Ex. 300).

103. As a result of the higher Local 802 scale and the 10% wage differential, the minimum union scale price which must be charged by a Local 802 orchestra leader performing in the jurisdiction of Local 38 is higher than the minimum union scale price which must be charged by a Local 38 leader performing in the same jurisdiction.

104. Notwithstanding the differential in scale price in favor of Local 38 members, Local 802 members, including plaintiff Cutler, have performed engagements in the jurisdiction of Local 38, both prior and subsequent to 1960

increases in Local 802 scale (Exs. GK-GT, HE, HF, LI, JQ, CE, GK-GR; 2572-91; Stipulated Fact 16). Plaintiff Cutler, both before and after the 1960 increases in Local 802 scale, almost without exception, bid for jobs in Westchester at prices in excess of union scale (2587-90).

C. Restrictions on Job Solicitation by Traveling Members

105. Under Federation's By-Laws a traveling member performing a steady traveling engagement is not permitted to solicit or accept a single engagement either in or out of the jurisdiction in which the steady engagement is being played during the tenure of the steady engagement (Ex. 300, Art. 17, § 14).

106. Under Federation's By-Laws, a member of a local may not form a traveling orchestra to compete with or fill engagements in his home local (Ex. 300, Art. 17, § 24). For example, a member of Local 802 may not form an orchestra to perform an engagement within Local 802's jurisdiction unless that orchestra consists entirely of members of Local 802.

107. Traveling orchestras which establish headquarters in the jurisdiction of any Local are not permitted to compete for or accept and play engagements in that jurisdiction (Exs. CM, 300, Art. 17, § 23).

108. An out-of-town orchestra leader playing a steady engagement in a particular jurisdiction is prohibited from playing a single engagement in that jurisdiction for some other client during the period of the steady engagement (Exs. CM, Art. 17, § 14; 300, Art. 17, § 14) or remain in the jurisdiction after completing a steady engagement to solicit another steady engagement (Exs. CM, Art. 17, § 17; 300, Art. 17, § 17). Nor may members of a traveling orchestra be used by the manager of a company with which they travel, or by the local employer, to displace the local orchestra or any member thereof, if the displacement interferes

with the contract under which the local orchestra is employed (Exs. CM, Art. 16, § 31; 300, Art. 16, § 27).

109. A traveling band may not play a radio or TV engagement which is local in character (not on a network) (Ex. CM, Art. 23, § 1).

D. The Local Work Dues Equivalent

110. Since January 1, 1964, Federation's By-Laws have provided for the payment by traveling members of local work dues equivalents to locals which require such payments. Local work dues equivalents are payments equal in amount to the work taxes which locals impose upon their own members in connection with earnings from jobs performed within the jurisdiction of such locals. Such payments are based upon a percentage of the members' earnings from such jobs (Ex. 300, Art. 2, § 8(c)).

111. Prior to January 1, 1964, Federation's By-Laws provided that traveling members could not be required to pay local work dues equivalents on engagements to which the Federation traveling surcharge tax applied (Ex. CM, Art. 16, § 26).

112. Under Federation's By-Laws, local work dues equivalents may be imposed only by a local which "uniformly requires its own members to pay the same percentage of their scale wages in connection with the rendition of the same classification of services" (Ex. 300, Art. 2, § 8(c)). Local work dues equivalents may not exceed 4% of scale wages and may not be imposed on wages of traveling members "derived from symphony or opera services" (Ex. 300, Art. 2, § 8(E), (F)).

E. Transfer Members

113. Under Federation's By-Laws, a member of one local who moves his residence to a place within the jurisdiction of another local and who indicates his wish to become a

member of such other local, is called a transfer member (Ex. 300, Art. 14); and Federation locals are required to accept applications to grant full membership to transfer members who have resided in their jurisdictions at least six months (id., § 2).

114. Under Federation's By-Laws, Art. 14, a transfer member may not solicit or perform any steady engagement within that local's jurisdiction for a period of three months after the date he is granted transfer membership (id., § 7). He is also prohibited from performing engagements outside the jurisdiction of the transfer local, except that he may do so with orchestras consisting of members of the transfer local after three months (id., §§ 8, 9).

XII. Booking Agents

115. Persons who act as "bookers, agents, representatives and managers of members, orchestras or bands, or who secure engagements and contracts for such members, orchestras and bands" are referred to as "booking agents" (Ex. 300, Art. 25, § 1).

116. Since 1936, Federation has required booking agents to enter into license agreements with Federation as a condition to representing or acting in behalf of Federation members (3370-73; Ex. JX).

117. Pursuant to the provisions of Federation's By-Laws, each such booking agent must enter into a standard form of license agreement with Federation under which he agrees not to charge more than a 10% commission on steady engagements, a 15% commission on single engagements, not to book non-union musicians, and not to book orchestras for less than union scale wages and working conditions (3373-74; Ex. 300, Art. 25, pp. 151-59). Federation makes no charge for the license agreement (533, 999).

118. The regulation of booking agents was considered at Federation's 1936 Convention. At that time, many booking agents charged exhorbitant fees to members and

booked engagements for musicians at wages which were below union scale (1016-17, 1121-24, 3370-73). The President's report made at that Convention stated (Ex. JX):

"Many booking offices or agents do not now charge the standard wage for musicians and, in other cases where they do so, same is not paid to the musicians. This condition could only develop with the connivance of some contracting members or leaders who, in collusion with agents, frustrate the efforts of the union to enforce its wage scale. These leaders, or contracting members, by thus violating the laws of their organization, gain an advantage over other leaders in securing employment. As a result, a great percentage of the orchestras doing jobbing work or filling casual engagements, play for less than the union scale, and, in cases where the union tries to control the situation through the deposit of contracts with the union, false contracts are often deposited."

119. Following the submission of that report, Federation adopted provisions relating to booking agents which are substantially the same as those presently in effect (3370-74). Subsequent to the adoption of the regulations governing booking agents, the abuses just referred to were, to a large extent, eliminated (1017, 1123-24).

XIII. Caterers

120. Many club date single engagements take place in catering halls which are rented by purchasers of the music. Catering halls do not supply orchestras, but some proprietors of catering halls recommend particular orchestras to prospective purchasers and receive commissions from the orchestra leaders (757-59, 773-74, 2330-5, 2361-63, 3246-48).

121. Local 802's By-Laws contain the following standing resolution (Ex, CJ, pp. 75-76):

"A. Caterers, banquet managers and others connected directly or indirectly with halls, hotels and all similar es-

tablishments which provide facilities for public or private functions, are prohibited from engaging leaders or musicians, for such affairs.

"B. Caterers or establishments violating the above may be placed on the Unfair List for such time and under such conditions as shall be determined by the Executive Board.

"C. The payment or promise of payment, or any gift or consideration whatever, to the above is contrary to the principle of fair competition among members of this local, and any member guilty of such offense shall be fined not more than Five Hundred Dollars ($500.00) or suspended, or both."

This standing resolution has been in effect for approximately fifteen years (3246).

122. In 1947, prior to the adoption of the By-Laws relating to caterers, Local 802 appointed a committee to investigate conditions in hotels and catering halls. The committee's preliminary report, which was printed in the February 1947 issue of ALLEGRO, stated (Ex. JN):

"The objective of this committee's important assignment can be stated simply: the elimination of the caterer from the music business and the restoration to the musician of his right to earn a living without any restrictions and pressures upon him. Your committee believes, and knows that in that belief it reflects the unanimous opinion of the membership, that all money spent for music should go to musicians and not to chiselers. We oppose any caterer booking orchestras because that obviously leads to a depressing of union scales. The caterer must be barred from compelling people to use a specific orchestra."

The committee found evidence of "monopoly" and "collusion."

XIV. Collective Bargaining

123. Defendent unions do not bargain collectively with purchasers of music or with orchestra leaders with respect to wages and working conditions applicable to single engagements (26, 252-54, 3262; St. Min. 581-82).

124. Defendant unions have for many years bargained collectively with purchasers of music in various non-club date fields (2984-95). Thus, there are presently in effect (or have recently expired and are in the process of negotiation), among others, the following collective agreements to which either or both of the defendant unions are parties:

(a) Collective agreement betweeen Federation and phonograph recording companies, effective January 1, 1959 (Ex. BS).

(b) Collective agreements between Federation and both NBC and CBS covering network radio and television, dated May 18, 1964 (Ex. BL-1, BL-3).

(c) Collective agreements between Federation and both NBC and CBS covering local radio and television, dated May 18, 1964 (Ex. BL-2, BL-4).

(d) Collective agreement between Federation and television film producers (blank form) (Ex. IM).

(e) Collective agreement between Federation and various makers of television video tape, effective July 1, 1964 (Ex. HX).

(f) Collective agreement between Federation and television film producers (Ex. HY).

(g) Collective agreement between Federation and television producers relating to pay television motion pictures (Ex. HZ).

(h) Collective agreement between Federation and television video tape producers (Ex. BN).

(i) Collective agreement between Federation and Independent Motion Picture Producers (Ex. BO).

(j) Collective agreement between Federation and Producers of Non-Theatrical Documentary & Industrial Films (Ex. BQ).

(k) Collective agreement between Federation and advertising agencies covering television and radio commercial announcements (Ex. BT).

(l) Collective agreement between Federation and producers of electrical transcriptions (Ex. BV).

(m) Collective agreement between Local 802 and The League of New York Theatres, Inc., dated June 25, 1964 (Ex. BI).

(n) Collective agreement between Local 802 and Shubert Interests Operating Legitimate Theatres in New York City, dated September 2, 1963 (Ex. BJ).

(o) Collective agreement between Local 802 and both American Export Lines Inc. and United States Lines Co., dated April 24, 1963 (Ex. IB, IB 1).

(p) Collective agreement between Local 802 and Radio City Music Hall, dated September 30, 1963 (Ex. BH).

(q) Collective agreement between Local 802 and The Metropolitan Opera, dated July 1, 1961 (Ex. CB).

(r) Collective agreement between Local 802 and the Philharmonic-Symphony Society of New York (Ex. BZ, BZ 1).

(s) Collective agreement between Local 802 and New York City Opera, dated March 12, 1962 (Ex. BX).

(t) Collective agreement between Local 802 and New York City Ballet, dated March 1, 1962 (Ex. BY).

(u) Collective agreement between Local 802 and Music Publishers Protective Ass'n, Inc., dated September 21, 1964 (Ex. IC).

(v) Collective agreement between Local 802 and hotels or restaurants (Ex. BK).

(w) Collective agreements between Local 802 and Cafe Geiger dated November 16, 1962, with letter of correction dated April 17, 1963 annexed (Ex. IA).

(x) Collective agreement between Local 802 and Michael Gaynor, regarding Flatbush Terrace, dated January 24, 1964 (Ex. CV).

(y) Collective agreement between Federation and the three major networks relating to TV film, dated as of May 1, 1964 (Ex. IO).

(z) Collective agreement between Local 802 and National Broadcasting Company, Inc., dated August 5, 1955 (Ex. IP).

(aa) Collective agreement between Local 802 and WNEW Radio New York, dated July 23, 1964 (Ex. KL). Similar agreements have been entered into with other stations (Exs. KJ, KK).

125. The collective agreements referred to above set forth the hours and working conditions of all musicians, including orchestra leaders, covered by those agreements. Those agreements were the result of negotiations between Federation or Local 802, or both of them, and the purchasers of music, or an association of purchasers of music (2995, broadcasting 2258-66; theatres 2992-93; steamships 3225-27; Radio City Music Hall 3020-22; Metropolitan Opera 2852-55; New York Philharmonic 3192-3; New York City Center Opera 2992; New York City Center Ballet 2992; hotels, restaurants and night-clubs 2988-89, 2991-92, 3197-3205, 3210, Exs. IT-JB).

126. Defendant unions, before bargaining collectively with the purchasers of music, conducted meetings of their members to formulate the demands to be bargained for (hotels, restaurants and nightclubs, 3214-17, Ex. JC; Yorkville restaurants, 3224; steamships, 3226; theatres, 3283). No spe-

cial invitations were sent to orchestra leaders to participate in the negotiations with the purchasers of the music (891-892, 1060). Upon completion of negotiations with purchasers, but prior to the execution of the collective agreement, members of defendant unions were given the opportunity to approve or disapprove of the proposed agreement (television networks 3183-4, Ex. II; recordings 3184-5, Ex. JT; television film (3186-87, Ex. IN; Radio City Music Hall 3022; New York Philharmonic-Symphony Society of New York, Inc. 3193; hotels, restaurants and nightclubs (3219-3222, 3225, Ex. JD).

XV. Monopoly

127. Defendant unions endeavor to foreclose non-union orchestra or leaders from the music field principally by not permitting members to play in the same orchestra as non-members (Ex. 300 Art. 13, §§ 5-7; Art. 18, § 26; Ex. 165, Art. 4, § 1 (h)), by not permitting members to deal with unlicensed booking agents (Ex. 300, Art. 25, §§ 4, 22), by not permitting licensed booking agents to book engagements for non-members (Ex. 300, Art. 25 at p. 151), by securing the cooperation of television companies (2314-15), record companies (1469) and hotels (1704-06, 2341) in not hiring non-union bands and by precluding non-members from entering Local 802's exchange hall where sidemen are hired for engagements (2108).

DISCUSSION

I. Class Action

Plaintiffs claim that they represent a class of orchestra leaders largely engaged in the single engagement field who (a) are employers who regularly employ sidemen or employee musicians who are members of AFM, Local 802, or another Local affiliated with AFM; and (b) are independent contractors largely engaged in the single engagement field. (Complaints, 60 Civ. 2939, par. 24; 60 Civ. 4926, par. 17)

It is also alleged that "this complaint raises common rights; and a common relief is sought herein; and the object of this action is the adjudication of claims which do or may seriously affect the specific property rights of plaintiffs and of said class * * *." (Complaints, 60 Civ. 2939, par. 23; 60 Civ. 4926, par. 16)

The class action is defined in Rule 23(a), Federal Rules of Civil Procedure:

"Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

"(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

"(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

The three categories of class actions in Rule 21(a), (b), (c) are called respectively "true," "hybrid" and "spurious." Under the prevailing view a judgment in the true class action is conclusive on all members of the class represented, in a hybrid class action on all members of the class as to rights in the res, and in a spurious class action on only the persons named as parties. Dickinson v. Burnham, 197 F.2d 973, 979 (2d Cir.), cert. denied, 344 U.S. 875 (1952) and cases cited. Since Hansberry v. Lee, 311 U.S. 32, 43 (1940), commentators have urged the abolition of

these distinctions in the effect of a judgment in the three types of class suits. Dickinson v. Burnham, supra at 979. The view advocated is reliance on the test of adequate representation to determine whether absent parties should be bound. Rank v. Krug, 142 F.Supp. 1, 154 n. 93 (D. Cal. 1956), modified on other grounds, California v. Rank, 293 F.2d 340 (9th Cir. 1961), modified on other grounds, Dugan v. Rank, 372 U.S. 609; Fresno v. California, 372 U.S. 627 (1963).

These divergent views have important practical ramifications. Since under the current view only the parties to the action are bound in a spurious class action, the issue of whether they adequately represent a class is only important as it relates to the right to intervene. York v. Guaranty Trust Co. of N.Y., 143 F.2d 503, 528, n. 52 (2d Cir. 1944), rev'd on other grounds, 326 U.S. 99 (1945). It is merely a device for permissive joinder. Carroll v. Associated Musicians of Greater New York, 206 F.Supp. 462, 469-70, 51 LRRM 2310 (S.D.N.Y. 1962), aff'd, 316 F.2d 574, 53 LRRM 2063 (2d Cir. 1963).

Nevertheless, I find that plaintiffs fail to adequately represent the class they purport to represent. This suit is part of a series of suits in which the same orchestra leaders are leading a challenge to various union activities. The present suit challenges many phases of union regulation. If successful in all respects it would substantially weaken the union. It would not be surprising if there was a division among the orchestra leaders in the union on this subject. The complaints themselves indicate that some orchestra leaders willingly cooperate with the union (e.g., Complaint, 60 Civ. 4926, pars. 24, 25, 41). Hansberry v. Lee, 311 U.S. 32 (1940); Giordano v. R.C.A., 183 F.2d 558, 26 LRRM 2380 (3rd Cir. 1950).

This question of conflict among the members of the proposed class was treated in three prior decisions involving musicians unions. In all, it was a basis for rejecting the

propriety of a class suit. Associated Orchestra Leaders of Greater Phila. v. Philadelphia Musical Soc., 203 F.Supp. 755, 757, 49 LRRM 3043 (E.D.Pa. 1962); Cutler v. AFM, 211 F.Supp. 433, 444-45, 51 LRRM 2729 (S.D.N.Y. 1962), aff'd, 316 F.2d 546, 53 LRRM 2060 (2d Cir.), cert. denied, 375 U.S. 941, 54 LRRM 2715 (1963); Carroll v. Associated Musicians of Greater New York, supra at 470-71.

Moreover, the plaintiffs do not adequately represent certain orchestra leaders whom they purport to represent. They lack certain characteristics that distinguish "name" bands:

(1) Distinctive musical styles based on the arrangements used by the band and, perhaps, the style of the leader as a soloist;

(2) National reputations; and

(3) Leaders who always appear and never use subleaders.

These characteristics would be relevant in any evaluation of the status of the name bandleaders under the antitrust laws.

The class suit or at least the representation of persons other than the parties to the suit fails on other grounds.

Rule 23(a)(1) requires that members of the class have a joint, common, or secondary right. The present suit clearly does not qualify, since the rights sought to be enforced are several and not secondary or derivative in nature.

Rule 23(a)(2) permits a class action where the rights of the members of the class are several and the action involves claims to specific property. No specific property will be affected by the present suit, hence, this provision is ineffective as support for a class suit here.

Rule 23(a)(3) provides for the spurious class suit. As was observed earlier, such a suit binds only the parties to

the action and is efficacious only as a device for permissive joinder. Therefore it is irrelevant whether this suit qualifies as a spurious class suit since no questions of joinder are now presented. Whether or not a spurious class action, only the parties will be affected. See Moore, 3 Federal Practice 3444-45, 3465 (2d ed. 1964).

Therefore, this action will be treated as affecting only the actual parties.

II. Alleged Antitrust Violations

The plaintiffs charge that the following acts of defendants violate the antitrust laws:

(1) pressuring orchestra leaders into the union;

(2) imposing minimum price regulations on orchestra leaders;

(3) imposing minimum numbers of sidemen requirements on orchestra leaders;

(4) requiring the use of the Form B Contract;

(5) imposing restrictions on traveling orchestras;

(6) failing to bargain collectively;

(7) regulating booking agents and caterers;

(8) monopolizing the music industry.

The plaintiffs' position as stated in the complaints is that these acts constitute a violation of the antitrust laws because they represent a combination between a union and orchestra leaders, including the unwilling plaintiffs, in restraint of trade.

III. Antitrust — Labor Law

With the benefit of "the light shed by the Norris-LaGuardia Act on the nature of the industrial conflict" the Supreme Court first stated the current extent of organized

labor's liability under the antitrust laws in United States v. Hutcheson, 312 U.S. 219, 7 LRRM 267 (1941). The Court read "the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct." Id. at 231

Exercising logic which has been much discussed since the decision, the court stated: "The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act," id. at 236, and concluded that "so long as a union acts in its self-interest and does not combine with non-labor groups" the conduct enumerated in Section 20 of the Clayton Act was not a violation of the Sherman Act.

The statement of the exemption was further developed in Allen-Bradley v. Local 3, International Bhd. of Electrical Workers, 325 U.S. 797, 16 LRRM 798 (1945). The court said that the Norris-LaGuardia Act "emphasized the public importance under modern economic conditions of protecting the rights of employees to organize into unions and to engage in 'concerted activities for the purpose of collective bargaining or other mutual aid and protection.'" Id. at 805. However, the court held that unions could not, "consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services." Id. at 808.

The meaning of the term "non-labor" group has been developed in a series of cases dealing with the issue of whether a union could organize and regulate independent contractors. Los Angeles Meat Drivers Union v. United States, 371 U.S. 94, 51 LRRM 2448 (1962); Milk Wagon Drivers Union v. Lake Valley Farm Prods., 311 U.S. 91, 7 LRRM 276 (1940); United States v. Fish Smokers Trade Council, Inc., 183 F.Supp. 227, 38 LRRM 2399 (S.D.N.Y. 1960); Cf., Bakery Drivers Union v. Wohl, 315 U.S. 769, 8 LRRM 457 (1941). Applying the Norris-LaGuardia Act,

a search was made in these cases for a "labor dispute" within the meaning of that Act to determine whether an exemption from the Sherman Act was available. The criterion used was the presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors. If such a relationship existed the independent contractors were a "labor group" and party to a labor dispute under the Norris-LaGuardia Act. Hence, the Sherman Act was inapplicable to any combination between the union and the independent contractors.

The ultimate issue in determining whether a relationship exists which would exempt conduct complained of from the Sherman Act is whether the work and functios performed by the independent contractors actually or potentially affect the hours, wages, job security or working conditions of the union members in the same industry. If so, the union may combine with the independent contractors by including them in the union and subjecting them to union regulation. Los Angeles Meat Drivers Union v. United States, supra; United States v. Fish Smokers Trade Council, Inc., supra at 234.

Since the scope of the union exemption from the Sherman Act is defined by its self-interest in collective bargaining and protecting and improving conditions of employment, the activities complained of by plaintiffs will be proper if they relate to such legitimate union interests and are not carried on in combination with a non-labor group. "[T]he same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups." Allen-Bradley Co. v. International Bhd. of Electrical Workers, supra at 810.

IV. Labor Or Non-Labor Group?

A glance at the list of alleged illegal practices suggests that the legality of two of them depends on whether the plaintiffs comprise a non-labor group. This issue will be examined prior to considering the legality of the individual practices.

If employees, the plaintiff orchestra leaders are certainly a labor group. If employers or independent contractors, they will be a labor group only if they meet the test of job or wage competition or other economic interrelationship which was just discussed. For the purposes of examining the status of the orchestra leaders under the antitrust laws in the club date and hotel steady engagement fields, it will be assumed, without deciding, that they are employers or independent contractors. See Cutler v. AFM, supra; Carroll v. Associated Musicians of Greater New York, supra.

A. Club Date and Hotel Steady Engagement Fields

I find that in the club date and hotel steady engagement fields the plaintiff orchestra leaders are in competition with employee members of the defendant union regarding jobs, wages and other working conditions. As a result, they comprise a labor group in these fields.

The evidence in this case discloses that plaintiffs made a practice of leading their own bands and, except for Peterson, often played instruments too. They also regularly booked more than one engagement for an evening, in which case they used subleaders to direct their orchestras.

In operating in this manner plaintiffs perform functions identical to acknowledged employees who were also union members—subleaders and sidemen. Moreover when one of the plaintiffs personally led his band he occupied a job that was a potential position for a subleader. When

a plaintiff played an instrument as well as conducted, he filled a slot that was a potential job for a sideman and also displaced a subleader.[2] In displacing sidemen and subleaders from potential jobs, plaintiffs engaged in job competition with them.

As a consequence of this relationship, the practices of plaintiffs when they lead and play must have a vital effect on the working conditions of the non-leader members of the union. If they undercut the union wage scale or do not adhere to union regulations regarding hours or other working conditions when they perform, they will undermine these union standards. They would put pressure on the union members they compete with to correspondingly lower their own demands. The evidence disclosed that plaintiff Levitt actually did lead a band at a steady engagement at a dance hall for which he received less than the subleader's union minimum wage. (3323-24)

B. Other Fields (Television, Recording and Concerts)

Although virtually all of the plaintiff's time is used in playing club dates and hotel steady engagements, for the sake of completeness the other fields in which plaintiffs have engaged will now be considered.

Plaintiff Cutler has made one or two recordings and has had a television engagement. Plaintiff Peterson has had some concert engagements.

In the concert field there is not sufficient evidence from which findings can be made either as to the status of Peterson as an employee or independent contractor, or as

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[2] If a subleader could be found who played the instrument usually played by the leader, then only a potential subleader's job would be lost.

to the existence of job or wage competition. He has not met his burden of proof in this regard.[3]

In the television and recording fields the evidence is inadequate to support findings as to job or wage competition. Further, an orchestra leader's status here is quite different from his position in the club date or hotel steady engagement field. It is not fruitful to assume that they are independent contractors. Therefore, in order to determine whether plaintiff Cutler was included in a non-labor group in these areas it will be necessary to consider whether he is an independent contractor or an employee.

This issue must be resolved by examining the degree of control which is exercised over the details of the service rendered by the orchestra leader and the factors which

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[3] It is unlikely that Peterson could show an antitrust violation in the concert area. His status in this field is relevant to two charges: pressuring leaders into the union and fixing minimum prices.

Since leading at concerts constitutes only a very small percentage of Peterson's activities and the rest of his business is conducted in a manner which justified the pressure to join the union, the fact that Peterson might be a "non-labor" independent contractor in the concert field is immaterial. The union would still be entitled to attempt to induce or force him to join.

Further, if Peterson only organizes the concerts and does not personally conduct or play, as has been his practice since expulsion, he has failed to establish that in this capacity pressure was, in fact, exerted on him to join the union. See V. infra. If Peterson actually conducts at the concerts, then it is likely that he is in job and wage competition with subleaders and a member of a labor group. As such, he would be a proper subject for unionization. See V, infra.

Regarding the charge of minimum price fixing, if Peterson does not conduct or play at concert engagements, this charge would be treated the same as it would in the club or hotel steady field. See VI, infra. There would be no antitrust violation. If Peterson does conduct at concert engagements, as stated above, he would probably be a member of a labor group and a proper subject for union regulation.

make up the economic reality of the relationship, e.g., "the permanency of the relation, the skill required, the investment in the facilities for work and opportunities for profit or loss." Bartels v. Birmingham, 332 U.S. 126, 130 (1947); United States v. Silk, 331 U.S. 704 (1947).

In contrast to the role of the orchestra leader in the single engagement field, Cutler v. United States, 180 F.Supp. 360 (Ct. Cl. 1960), the evidence discloses that in television and recording the orchestra leader is subject to considerable artistic supervision. An employee of the television or record company is charged with directing the performance and seeing that a product which fits the company's idea of a saleable item is produced. Usually the orchestra is integrated into a larger product which again must meet company standards. The television or recording company also selects the sidemen and pays them. The orchestra leader does not bear the risk of loss in the enterprise and generally does not have an interest in the profits (unless he is the featured artist on a recording). The facilities other than the instruments used, and occasionally even instruments, are furnished by the recording or television company.

After reviewing all the evidence of the relationship between the orchestra leader and the television or recording company, and principally for the above reasons, I conclude that in the television and recording fields the plaintiff Cutler is an employee. See American Broadcasting Company 134 NLRB 1458, 49 LRRM 1365 (1961). I make no finding as to big-name bands, which, as I noted earlier, are not represented among the plaintiffs.

The two practices complained of by plaintiffs with respect to which the status of the orchestra leaders as a labor group is relevant are: (1) pressuring plaintiffs into joining the union; (2) fixing minimum leaders' fees and minimum engagement prices.

V. Pressuring of Orchestra Leaders Into Joining the Union

It is clearly permissible for a union to pressure a group of independent contractors comprising a labor group into joining the union. Los Angeles Meat Drivers v. United States, 371 U.S. 94, 103, 51 LRRM 2448 (1962). Picketing was upheld as a means of inducing independent contractors comprising a labor group to join a union in Milk Wagon Drivers Union v. Lake Valley Farm Prods., Inc., supra, and an agreement foreclosing all but union jobbers from the smoked fish industry which was directed to forcing jobbers into the union was held to violate the Sherman Act in United States v. Fish Smokers Trade Council, Inc., supra, only because the jobbers were found to comprise a *non-labor* group.

In a decision relating to the AFM, United States v. AFM, 47 F. Supp. 304, 11 LRRM 596 (N.D. Ill. 1942), aff'd, 318 U.S. 741, 11 LRRM 840 (1943) (per curiam), the Supreme Court held the union's attempt to "eliminate all musical performances over the radio except those presented in person by members of the American Federation of Musicians," id. at 307, to be exempt from the Sherman Act by virtue of the Norris-La Guardia Act. See National Labor Relations Act, 29 USC, § 158(3) (1958). By limiting employment to union members, a union is, of course, coercing non-union workers to join it. Since the former is permissible, the latter certainly is.

There is no evidence in the record to indicate that the unionization of the plaintiffs was other than a matter of independent union action motivated by union self-interest. Allen-Bradley v. Local 3, International Bhd. of Electrical Workers, supra at 811; United States v. Hutcheson, supra at 232.

In conclusion, since the plaintiffs are a labor group in the club date and hotel steady engagement fields, the de-

fendants do not violate the antitrust laws in pressuring them into membership.

Since their expulsion from the defendant unions, Carroll and Peterson have not personally led or played at their engagements. They merely book and organize them. In this capacity they do not compete with sidemen or subleaders and the basis of the conclusion that they are a labor group falls. However, the union does not significantly hinder them from carrying on their business in this fashion. (See F.F. 12, 127.) Insofar as they do not themselves conduct or play, the charge of pressuring them into the union has not been sustained.

In the television and recording fields, the union is unquestionably free to pressure orchestra leaders like plaintiffs into membership since they are employees.

VI. Fixing Minimum Prices Charged by Leaders

The minimum prices set by the union are equal to the total minimum wages of the sidemen employed plus a leader's minimum fee. If the leader does not participate in the engagement but employs a subleader, then a prescribed portion of the leader's fee goes to the subleader. The remaining fraction of the leader's fee goes to the leader. In reciting the extra charges to be paid a leader, the union Price List booklet refers to the leader in parenthesis as a "personnel manager."

In view of the competition between leaders and sidemen and subleaders which underlies the finding that the leaders are a labor group, the union has a legitimate interest in fixing minimum fees for a participating leader and minimum engagement prices equal to the total minimum wages of the sidemen and the participating leader. Any cuts by participating leaders of their fees below union minimums or in the price of an engagement below a union minimum equaling the total minimums of the participants puts an

obvious downward pressure on the wages of subleaders and sidemen (e.g., 1122).

The legitimacy of the concern of the union in fixing the minimum prices to be charged by a group of independent contractors comprising a labor group was upheld in Local 24, International Bhd. of Teamsters v. Oliver, 358 U.S. 283, 43 LRRM 2374 (1958). The Supreme Court reversed a decision by the Ohio Supreme Court in which a collective bargaining agreement fixing the minimum rental prices of driver-owned trucks was held to constitute a violation of the Ohio antitrust law as a combination between the union and a non-labor group to fix prices. The Supreme Court held that the rental price of driver-owned trucks was a proper subject of bargaining under the National Labor Relations Act in view of the purpose of the provision to protect the wage scale of employee-drivers as well as to provide a decent income to the owner-drivers.

In Milk Wagon Drivers Union v. Lake Valley Farm Prods., Inc., supra, the Supreme Court held the Sherman Act inapplicable to a union's efforts to organize a group of "vendors" who owned their own trucks and bought milk for resale to retail stores. The union's purpose was to improve the working conditions and "wages" of the vendors and to thereby protect the standards of the employee-drivers.

The question of whether the union can also provide a certain minimum compensation for "personnel managing" services to leaders who merely arrange an engagement (e.g., solicit it and organize the band) without participating in it, and insure a similar payment above the regular subleader's fee when they do participate is more difficult. Indeed, as noted earlier, Carroll and Peterson do not now personally lead at their engagements, but merely arrange them. The leader who performs the necessary functions of soliciting and organizing engagements also negotiates the price of the engagement with the purchaser of the music.

It is unquestionably true that skimping on the part of the person who sets up the engagement so that his costs are not covered is likely to have an adverse effect on the fees paid to the participating musicians. By fixing a reasonable amount over the sum of the minimum wages of the musicians participating in an engagement to cover these expenses, the union insures that "no part of the labor costs paid to a * * * [leader] would be diverted by him for overhead or other non-labor costs." Greenstein v. National Skirt & Sportswear Ass'n, Inc., 178 F.Supp. 681, 689 (S.D.N.Y. 1959).

In Greenstein v. National Skirt & Sportswear Ass'n, Inc., supra, the status of an analogous agreement between a union and manufacturers of ladies clothing to the effect that the manufacturers pay to contractors who produce their garments an amount at least equal to the combined wages of the contractor's employees and a reasonable amount to cover overhead was in issue on a motion for preliminary injunction. The court concluded that the agreement did not violate the Sherman Act without proof that it was a result of a conspiracy to restrain trade between the employer and the union. "If these protective clauses were demanded and obtained by the union * * * as a matter of independent action in furthering the welfare of the employees they represent, then the Allen-Bradley case * * * is inapposite." Id. at 689. Allen-Bradley v. Local 3, International Bhd. of Electrical Workers, supra at 811; United States v. Hutcheson, supra at 232.

There is no evidence in this record to indicate that the minimum price lists were sought by the union as part of a conspiracy in which the union aided "non-labor groups to create business monopolies and to control the marketing of goods and services." Allen Bradley v. Local 3, International Bhd. of Electrical Workers, supra at 808. Nor is there any evidence which indicates that the increment to the personnel manager is unrelated to his costs in that

function. I conclude that the union's price lists do not violate the Sherman Act.

In recording and television, subleaders are apparently not used and the leader's fee would go to the actual conductor. It is perfectly permissible for the union to negotiate a minimum wage for leaders in these fields since they are employees.

The legality of the other acts charged to be violations of the antitrust laws may be considered without regard to the status of the plaintiffs as a labor group. In all of the following matters there is no evidence to indicate that the defendants acted other than independently in their own self-interest. Allen-Bradley v. Local 3, International Bhd. of Electrical Workers, supra at 811; United States v. Hutcheson, supra at 232.

VII. Refusal to Bargain

The defendant unions do not bargain collectively either with orchestra leaders or purchasers of music in the club date single engagement field. Insofar as the antitrust laws are concerned, it is not illegal for a union to refuse to bargain with an employer or a group of employers. Hunt v. Crumboch, 325 U.S. 821, 16 LRRM 808 (1945). Therefore, even assuming that the orchestra leaders are employers in the single engagement field, defendants have committed no violation of law by failing to bargain with them.

VIII. Imposing Minimum Employment Quotas

The defendants have succeeded in imposing minimum numbers of men as requirements on various types of engagements. Minimum quotas are included within the exemption from the Sherman Act afforded by the definition of a labor dispute in the Norris-LaGuardia Act. United States v. Carrozzo, 37 F.Supp. 191 (N.D. Ill.), aff'd, 313

U.S. 539 (1941) (per curiam); United States v. AFM, supra.

IX. Requiring Orchestra Leaders To Use The Form B Contract

The language of the Form B Contract describes the orchestra leader as an employee and the purchaser of the music as an employer. Its function is apparently to help establish this relationship in law. It also serves as a means of policing adherence to union scale, since the union requires that such contracts or, in the club date field, a report, be filed. The contract shows the price and terms of the engagement.

It is not clear how the use of the Form B Contract can result in a restraint of trade. In practice, the contract has failed miserably in fulfilling its primary purpose —making employees out of orchestra leaders.

The status of orchestra leaders in the club date single engagement field has been ruled on by courts on several occasions. In each instance the courts looked to all the factors which made up the employment relationship and concluded that the orchestra leaders involved there (Cutler, Carroll, Peterson) were employers. E.g., Cutler v. AFM, supra; Carroll v. Associated Musicians of Greater New York, supra; Cutler v. United States, supra. The Form B Contract was signally unpersuasive, "a self-serving subterfuge which is not entitled to any weight," according to Judge Lumbard, Cutler v. AFM, 316 F.2d at 548-49, 53 LRRM 2060. I can see no restraint of trade in the terminology in the Form B Contract referring to orchestra leaders as employees.

Nor does the requirement that the contracts be filed with the union violate the antitrust laws. The union has a legitimate interest in knowing the terms under which its members work and does not restrain trade in gathering this information.

X. Regulating Booking Agents and Caterers

A. *Booking Agents*

The Federation instituted the licensing of booking agents and the fixing of maximum commissions at a time when the activities of booking agents were instrumental in depressing wages paid to union musicians below the union scale. Apparently, similar abuses by booking agents existed in other fields too. Edelstein v. Gillmore, 35 F.2d 723, 726 (2d Cir. 1929) (actors). The objective of the Federation was the elimination of the practices which undermined the musicians' wage structure and the regulations adopted were successful.

Booking agents are independent contractors not in job or direct wage competition with members of the defendant unions. Apparently, no court has had to decide the question of whether a group of independent contractors performing different functions than a union's members and not in competition with union members for jobs may be subjected to union regulations consistent with the antitrust laws.

In affirming the decision of the district court in Los Angeles Meat Drivers Union v. United States, supra, the Supreme Court was careful to note and repeat, id. at 103, the absence of "any actual or potential wage or job competition, *or of any other economic interrelationship,* between the grease peddlers [independent contractors] and the other members of the union." Id. at 98. On this basis it is safe to assert that economic interrelationships other than actual or potential job or wage competition will suffice to support a finding that a group of independent contractors are a labor group. Id. at 104 (Goldberg, J. concurring).

The scope of the exemption accorded to labor from the antitrust laws is determined by the definition of "labor dispute" in Section 13 of the Norris-LaGuardia Act, 29

USC § 113. United States v. Hutcheson, supra. Section 13(c) provides that such a dispute "includes any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." A person is "participating or interested in a labor dispute" under Section 13(b) if he "is engaged in the same industry, trade, craft, or occupation, in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation."

This definition of a labor dispute is the source of the test of actual competition or other economic interrelationship between independent contractors and union members for determining whether the former is a labor group that the union may regulate. Los Angeles Meat Drivers v. United States, supra; Milk Wagon Drivers Union v. Lake Valley Farm Prods., Inc. supra. Although job and wage competition may be the most common indicia of a labor dispute involving independent contractors, there is no reason why such competition should be the only criterion satisfying the Norris-LaGuardia definition.

Because the activities of the booking agents here have and had a direct and substantial effect on the wages of the members of defendants, I find that they are in an economic interrelationship with the members of defendants such that the defendants are justified in regulating their activities without contravening the Sherman Act. Furthermore, I find the regulations to be reasonably related to their interest in maintaining observance of union scale wages and working conditions.

B. *Caterers*

Caterers, also independent contractors not in job or wage competition with union members, are in a unique position to affect the choice of orchestras by purchasers of music and the wages and working conditions of musicians. They have frequent contact with purchasers of music, control places where musicians perform and are relied on to arrange many aspects of the functions at which musicians perform.

The evidence discloses that caterers took advantage of their position before the union adopted its regulations to, in effect, book orchestras and they continue to do so, at least to some extent. Caterers recommend orchestras to customers and receive commissions from orchestra leaders. These practices actually or potentially affect the wages of the musicians involved.

I believe that this constitutes an economic interrelationship which permits the defendants to regulate and prohibit the booking activities of the caterers without violating the Sherman Act.

XI. Restrictions on Traveling Orchestras

Various AFM regulations favor the employment of local musicians rather than musicians from outside the jurisdiction. The principal incentive to employ local musicians is a requirement that "foreign" musicians be paid higher wages.

Local employment and working conditions have long been recognized as legitimate concerns of labor unions. See American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 209 (1921). In the face of antitrust attack, courts have repeatedly sustained union regulations requiring a foreign employer to adhere to the shorter workday and the higher wage scale of the standards prevailing in his home local or the local where the work was

to be performed and to hire a specified percentage of his men from the latter local. Rambusch Decorating Co. v. Brotherhood of Painters, 105 F.2d 134, 4 LRRM 543 (2d Cir. 1939), cert. denied, 308 U.S. 587, 5 LRRM 693 (1939); Barker Painting Co. v. Brotherhood of Painters, 23 F.2d 743 (D.C. Cir. 1927), cert. denied, 276 U.S. 631 (1928); Barker Painting Co. v. Brotherhood of Painters, 15 F.2d 16 (3rd Cir. 1926), cert. denied, 273 U.S. 748 (1927).

The Second Circuit noted in Rambusch, supra at 138:

"* * * Of course, the real point here relied on is the supposed discrimination between non-resident and resident contractors. Discrimination of this general kind is one of the most natural things in the world, applied by states and cities in civil service appointments; by courts in cost bonds and other burdens against non-residents; by merchants, customers, laborers, and servants in trusting and favoring the local man with whom they have long dealt and expect to deal in the future. * * *"

I find no antitrust violation in the regulations here protecting local employment opportunities.

XII. Monopolization

Plaintiffs' claim that the defendant unions are attempting to or have monopolized the music industry boil down to the fact that the defendants are enforcing a closed shop. It is clear that this violates no antitrust law. United States v. AFM, supra; Courant v. International Photographers of Motion Picture Industry, 176 F.2d 1000, 24 LRRM 2510 (9th Cir. 1949), cert. denied, 338 U.S. 943, 25 LRRM 2265 (1950); Kolb v. Pacific Maritime Ass'n, 141 F.Supp. 264 (N.D. Cal. 1956).

In conclusion I find that defendants have violated no antitrust law. The complaints also allege the existence of a common-law restrain of trade. I find this charge to be equally without substance.

Although the defendants have successfully defended this suit, they are not entitled to attorneys' fees. 15 USC § 15; Talon, Inc. v. Union Slide Fastener, Inc., 266 F.2d 731, 739-40 (2d Cir. 1959); Alden-Rochelle, Inc. v. ASCAP, 80 F.Supp. 888, 899-900 (S.D.N.Y. 1948).

CONCLUSIONS OF LAW

1. The defendant unions are labor organizations within the meaning of the Norris-LaGuardia Act, 29 USC §§ 101-113; the National Labor Relations Act, 29 USC § 151 et seq.; and the Clayton Antitrust Act, § 6, 29 USC § 17.

2. Defendants' motion to strike certain evidence, on which decision was reserved, is denied.

3. Plaintiffs Turecamo and Terry are no longer parties to this action.

4. Plaintiff Orchestra Leaders of Greater New York is not a proper party plaintiff and lacks standing to sue in this action.

5. The plaintiffs have failed to establish their claim to represent other orchestra leaders. Only the parties to the action will be affected by the decree.

6. There is job and wage competition and other economic interrelationships, significantly affecting defendant' legitimate union interests between plaintiffs in the club date single and hotel steady engagement fields and other employee-members of defendant unions who perform services as subleaders and sidemen in the club date and hotel steady engagement fields.

7. The plaintiffs are employees of the recording companies and television broadcasters when they perform services for them.

8. The plaintiffs constitute a "labor" group.

9. The defendant unions may legally pressure the plaintiffs into becoming members.

10. None of the defendants' regulations and practices complained of by plaintiffs constitute a violation of the federal antitrust laws (15 USC §§ 1 et seq.) or a common-law restraint of trade. They all come within the definition of the term "labor dispute" in the Norris-LaGuardia Act, 29 USC § 113, and are exempt from the antitrust laws.

11. The complaints in these actions should be dismissed and judgments entered for defendants, with costs to defendants.

APPENDIX C

Statutory Provisions Involved

Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 1 provides in pertinent part as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal:
>
> • • •

Section 6 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 17 provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 20 of the Clayton Act, 38 Stat. 738, 29 U.S.C. § 52 provides:

> No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there

is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person, or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Section 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 104 provides:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peacefully to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

Section 13 of the Norris-LaGuardia Act, 47 Stat. 73, 29 U.S.C. § 113 provides:

When used in this chapter, and for the purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation;

or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seekig to arrage terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the court of the District of Columbia.